

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4 In Re:) Docket No. 3:17-BK-3283 (LTS)
5)
6) PROMESA Title III
7 The Financial Oversight and)
8 Management Board for)
9 Puerto Rico,) (Jointly Administered)
10)
11 as representative of)
12)
13 The Commonwealth of)
14 Puerto Rico and the)
15 Puerto Rico Electric)
16 Power Authority,) June 3, 2020
17)
18 Debtors,)

13 In Re:) Docket No. 3:17-BK-4780 (LTS)
14)
14) PROMESA Title III
15 The Financial Oversight and)
15 Management Board for)
15 Puerto Rico,) (Jointly Administered)
16)
16 as representative of)
17)
17 The Puerto Rico Electric)
18 Power Authority,)
18)
19 Debtor,)

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2 In Re:) Docket No. 3:17-BK-3567 (LTS)
3)
4) PROMESA Title III
5 The Financial Oversight and)
6 Management Board for)
7 Puerto Rico,) (Jointly Administered)
8)
9 as representative of)
10)
11 The Puerto Rico Highways)
12 and Transportation)
13 Authority,)
14)
15 Debtor,)

OMNIBUS HEARING

12 BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN
13 UNITED STATES DISTRICT COURT JUDGE
14 AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN
15 UNITED STATES DISTRICT COURT JUDGE

17 || APPEARANCES:

18 ALL PARTIES APPEARING TELEPHONICALLY

19 For The Commonwealth
20 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV
21 Mr. Brian S. Rosen, PHV
Ms. Hadassa R. Waxman, PHV
Mr. Michael A. Firestein, PHV
Mr. Paul Possinger, PHV

23 For the Official
Committee of Unsecured
Creditors: Mr. Luc A. Despins, PHV

1 APPEARANCES, Continued:

2 For the Puerto Rico
3 Fiscal Agency and
3 Financial Advisory
4 Authority:

Mr. Peter Friedman, PHV
Mr. Luis C. Marini Biaggi, Esq.
Mr. John J. Rapisardi, PHV

5 For Union de
6 Trabajadores de la
7 Industria Electrica
y Riego, Inc.:

Ms. Jessica E. Mendez Colberg, Esq.

8 For Puerto Rico
9 Electric Power
Authority:

Mr. Joseph P. Davis, III, PHV
Mr. Kelly Malone, PHV

10 For Cobra Acquisition,
11 LLC:

Mr. Abid Qureshi, PHV

12 For Ambac Assurance
13 Corporation:

Mr. Andrew K. Glenn, PHV

14 For Windmar Renewable
15 Energy, Inc.:

Mr. Fernando E. Agrait, Esq.

16 For Autopistas
Metropolitanas de
17 Puerto Rico:

Mr. Keith Martorana, PHV

18 For EcoElectrica, L.P.:

Mr. Frederic Sosnick, PHV

19 For Environmental
20 Advocacy Group:

Mr. William Santiago Sastre, Esq.

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25 Proceedings recorded by stenography. Transcript produced by
CAT.

	I N D E X	
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2	WITNESSES:	
3	None offered.	
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5	EXHIBITS:	
6	None offered.	
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1 San Juan, Puerto Rico

2 June 3, 2020

3 At or about 9:36 AM

4 * * *

5 THE COURT: Buenos dias. Judge Swain here.

6 Ms. Tacoronte, would you please call the case?

7 COURTROOM DEPUTY: Absolutely, Your Honor. Good
8 morning.

9 Bankruptcy case 2017-3283, *In Re: The Financial
10 Oversight and Management Board for Puerto Rico as
11 representative of the Commonwealth of Puerto Rico, et. al.*

12 THE COURT: Again, good morning. This is Judge Swain
13 presiding, and Magistrate Judge Dein is also present.

14 Welcome counsel, parties in interest and members of
15 the public and press. Today's telephonic Omnibus Hearing is
16 once again occurring against a backdrop of circumstances that
17 have been extremely challenging for all participants. Our
18 thoughts remain with all of the people on the island and on
19 the mainland who have been affected directly and indirectly by
20 the coronavirus pandemic, and are also with those in cities
21 where issues of speech, human dignity and public order are the
22 focus of tension.

23 We hope for success in resolving the public crises
24 and safety as the ongoing lockdown restrictions are eventually
25 lifted. We look forward to the time when we will be able to

1 travel safely to Puerto Rico again, and eventually to a
2 successful conclusion of these Title III proceedings.

3 To ensure the orderly operation of today's telephonic
4 hearing, all parties on the line must mute their phones when
5 they are not speaking. Please be sure to select mute on the
6 Court Solutions dashboard if you are accessing these
7 proceedings on a computer.

8 I remind everyone that consistent with court and
9 judicial conference policies and the Orders that have been
10 issued, no recording -- I think there's someone who's not
11 muted. So if you're not sure, mute yourself, please. Thank
12 you.

13 No recording or retransmission of the hearing is
14 permitted by any person, including but not limited to the
15 parties, members of the public, or the press. Violations of
16 this rule may be punished with sanctions.

17 I will be calling on each speaker during these
18 proceedings. When I do, please identify yourself by name for
19 clarity of the record. After the speakers listed on today's
20 Agenda for each of today's matters has spoken, I may provide
21 an opportunity for other parties in interest to address
22 briefly any issues raised during the course of the discussion
23 that require further remarks. If you wish to be heard under
24 these circumstances, please state your name clearly at the
25 appropriate time. I will call on the speakers if more than

1 one person wishes to be heard.

2 Please do not interrupt each other or me during this
3 hearing. If we interrupt each other, it is difficult to
4 create an accurate transcript of the proceedings. Having said
5 that, I apologize in advance for breaking this rule, as I may
6 interrupt if I have questions, or if you go beyond your
7 allotted time. However, if anyone has difficulty hearing me
8 or another participant, please say something immediately.

9 The time allotments for each matter, and the time
10 allocations for each speaker, are set forth in the Agenda that
11 was filed by the Oversight Board on Monday, June 1st. The
12 Agenda, which was filed as docket entry 13305 in case 17-3283,
13 is available to the public at no cost on Prime Clerk for those
14 interested.

15 I encourage each speaker to keep track of his or her
16 own time. The Court will also be keeping track of the time
17 and will alert each speaker when there are two minutes
18 remaining with one buzz, and when time is up, with two buzzes.
19 Here is an example of the buzz sound that you will hear.

20 (Sound played.)

21 THE COURT: If your allocation is two minutes or
22 less, you will just hear the final double buzz.

23 If we need to take a break, I will direct everyone to
24 disconnect and dial back in at a specified time. This
25 morning, our timing is from 9:30 to noon, and we'll pick up

1 again from 1:00 to 5:00 if that is necessary.

2 The first Agenda item is, as usual, status reports
3 from the Oversight Board and AAFAF. As I requested in the
4 Procedures Order, these reports have been made in writing in
5 advance of this telephonic hearing and are available on the
6 public docket at docket entries 13337 and 13353 in case number
7 17-3283.

8 I thank the Oversight Board and AAFAF for the care
9 and detail reflected in the reports. I find them quite
10 comprehensive. I do have one additional question for counsel
11 to the Oversight Board, which I will pose after the Oversight
12 Board's counsel introduces himself and makes any further
13 remarks that he wishes to make.

14 Mr. Bienenstock or Mr. Rosen?

15 MR. BIENENSTOCK: Good morning, Your Honor. This is
16 Martin Bienenstock.

17 We didn't have any additional comments, so, happy to
18 take whatever questions the Court has.

19 MR. ROSEN: Yes. Your Honor, this is Brian Rosen.

20 Subsequent to the filing of the status report, we
21 heard from chambers that you were interested in additional
22 information regarding the ACR, ADR processes, as well as the
23 claims. If you'd like, I can address those points.

24 THE COURT: Yes. That is the additional question.

25 MR. ROSEN: If you don't mind, Your Honor, I'll go

1 back over some older territory just to bring it up to speed
2 with respect to the claims process.

3 THE COURT: Yes.

4 MR. ROSEN: Your Honor, as you know, there were
5 approximately 177,000 claims filed in the approximate amount
6 of 43.6 trillion dollars of asserted liabilities. So far,
7 claims expunged are approximately 35,000, relating to
8 approximately 43 trillion of those liabilities. There have
9 been additionally 9,000 claims withdrawn, representing 174
10 billion dollars.

11 And there are claims on omnibus objections that are
12 pending before the Court of approximately 56,000, for an
13 additional four and a half billion dollars of liabilities.
14 Those are either subject to objections that have not been
15 heard yet by the Court, or orders that have not been entered,
16 or, as the Court is well aware, we did push some off several
17 times due to people claiming that they needed additional
18 notice. Those are all slated to be heard at the July 29th
19 Omnibus Hearing, and we are intending to file additional
20 omnibus objections between now and that time so that they will
21 also be on the calendar for that date.

22 So that leads, Your Honor, to claims for -- I'm
23 sorry.

24 THE COURT: Mr. Rosen, may I just say one thing? In
25 scheduling and in adjourning certain of these omnibus

1 objections, you are paying close attention to the degree to
2 which government offices that may be relevant to someone's
3 ability to respond properly to the claim are still in shutdown
4 or reduced mode on the island?

5 MR. ROSEN: We are, Your Honor. And that actually
6 impacts the next thing I'm about to talk about, which is the
7 ACR and the ADR processes. We're very cognizant of that, and
8 we've been working very closely with the Department of
9 Justice, AAFAF, and other agencies in trying to compile
10 information, as well as being responsive to some of the
11 concerns or questions that individual claimants or creditors
12 might have.

13 Your Honor, we, at this point, believe that there are
14 approximately 11,000 claims that will be slated for the ADR
15 process, the alternative dispute resolution, and approximately
16 49,000 which will go to the ACR process. I say 49,000, Your
17 Honor, but that may actually come down as we continue to look
18 at some of those claims. Many of them, we're now finding out,
19 are actually claims that have already been satisfied, paid by
20 the government. So they will come out of the ACR process, and
21 they will be the subject of an omnibus objection as already
22 deemed satisfied.

23 On the ADR process itself, Your Honor, and in taking
24 the cue from the Court for both the ACR and the ADR, we are
25 anticipating that, of those 11,000 slated for ADR, very few

1 will be done initially. We have a current obligation to file
2 a notice with the Court on July 10, which will list the first
3 claims which will go into the ADR process.

4 Because the government has been on shutdown, Your
5 Honor, and is not scheduled to open at this point until June
6 15, we've been somewhat hamstrung in collecting all the
7 necessary information to put together a big slate of claims to
8 go into that ADR process. So we're going to test it, as you
9 suggested. We'll do a test run, and we will have just a few
10 claims put into the ADR at the outset.

11 We have also been -- Ms. Stafford and I have been
12 taking bids -- excuse me. I shouldn't say just us. The
13 Oversight Board has been taking bids from arbitration
14 providers. We've been collecting those and doing an analysis
15 to determine which of those or which of that provider should
16 be the arbitration servicer here for this process.

17 We will bring in, as we collect that information, we
18 will discuss those proposals with interested parties,
19 including the Unsecured Creditors Committee. And we
20 anticipate and hope to file an informative motion with the
21 Court regarding that selection as soon as possible. We think
22 it will probably be, Your Honor, by the end of the month of
23 June.

24 With respect to the ACR process, Your Honor, again,
25 that is -- a first slate is due to be filed with the court on

1 July 10th. We are working closely with AAFAF, ERS, and the
2 other Commonwealth agencies to review and reconcile those
3 which are suitable for the ACR process. And in that regard,
4 letters have been going out to the various agencies to collect
5 the information, and we're doing our best to set up that
6 mechanism that is in the ACR Approval Order, so that there
7 will be claims done on a relatively short time frame and we
8 will know exactly which claims have been resolved. And we can
9 report those back to the Court as expeditiously as possible
10 after that in accordance with the procedures.

11 Your Honor, unless you have any additional questions,
12 I think that would be it for the claims and the ACR and the
13 ADR.

14 THE COURT: Thank you very much. I do appreciate
15 that comprehensive and concise update. And I'm also glad to
16 hear that the first tranche going into ADR will be a
17 relatively small test run, as we are still in the process of
18 setting up the evaluative mediation mechanism, and it will be
19 helpful to be able to see how a small group makes its way
20 through the process in the first instance.

21 MR. ROSEN: Your Honor, if I could add just one other
22 thing to bring to the Court's attention. As you know, we have
23 periodically asked the Court to extend the period or the bar
24 date for the PBA claims, as well as the submission of benefit
25 information with respect to ERS. While lobbies or business

1 lobbies are now open in Puerto Rico, the collection centers
2 have not truly been up and running, and we have not been
3 collecting what we thought would be the universe of claims
4 that we expected.

5 So we are going to file an informative motion with
6 the court, Your Honor, seeking to extend both the bar date and
7 that ERS submission date, just to allow an additional time
8 period. As I said, June 15 is the current date when the
9 Governor is hopeful -- going to open it up or reduce the
10 lockdown in Puerto Rico. We'll know much more. So we're
11 going to hold off on filing that informative motion until we
12 hear from the Governor, Your Honor, but we will be asking for
13 an extension of those periods.

14 THE COURT: Very well. And so since that's a motion
15 that will be requesting Court action, you'll do it as an
16 urgent motion rather than an informative motion?

17 MR. ROSEN: Probably so, Your Honor. That's correct.
18 Sorry for that misstatement.

19 THE COURT: Yes. We try to keep track and act on
20 things that are clearly labeled as requesting action and do
21 that most quickly. And of course we read the informative
22 motions as well, but it is very helpful when everyone complies
23 with the CMO and the local rule and labels something that is
24 requesting Court action as a motion or, if necessary, an
25 urgent motion rather than an informative motion.

1 So thank you for your patience with my housekeeping
2 note there.

3 MR. ROSEN: No problem. Thank you very much, Your
4 Honor.

5 THE COURT: Thank you, Mr. Rosen.

6 I also would note that last night, San Juan filed an
7 informative motion asking to be involved in the Law 29
8 discussions. So I ask the parties to those discussions to be
9 mindful of San Juan's request for direct contact as the
10 discussions continue.

11 I understand from an informative filing last night
12 that Mr. Despins wished to be heard in connection with the
13 Oversight Board's report. Mr. Despin, would you like to make
14 your remarks now?

15 MR. DESPINS: Yes. Good morning, Your Honor. Thank
16 you.

17 THE COURT: Good morning.

18 MR. DESPINS: This will be brief. Your Honor, the
19 Committee is concerned about the lack of clarity with respect
20 to the status of the PSA in the Commonwealth case. And I want
21 to be clear, this is not about the Committee being critical,
22 because we are not critical of the Board on that point, of the
23 Board taking its time to review the effects of COVID-19 on the
24 Puerto Rico economy. That's perfectly appropriate.

25 But it is clear, I think, at this time that there is

1 no PSA settlement. Just to take the remarks of Professor
2 Skeel at the last public conference of the Board, he said that
3 the PSA provides a good framework to start a discussion
4 regarding a plan. So -- and despite the Board's efforts to
5 not go there, and I understand why they want to -- want to go
6 there -- and by the way, I would do the same if I were in
7 their shoes -- I think we have to be clear that there is no
8 such settlement.

9 And in that context, Your Honor, we're not asking for
10 any relief today, but clearly your March 10th Order was based
11 on -- the March 10th Order imposing a stay regarding the
12 objection that we had filed on February 3rd, on the priority
13 of the GO bonds, that Stay Order was based entirely on the
14 existence of a plan settlement and the fact that these issues
15 would be resolved through a plan.

16 And that one day may be the case, but today, and for
17 the foreseeable future, that is not the case. And the
18 Committee believes that this issue, which is a very narrow
19 issue of law, the issue being the priority of the GO bonds,
20 needs to go forward. And again, as I said, we're not asking
21 for a ruling from the Court today. That would not be the
22 proper procedural vehicle to do so. But we believe that there
23 should be clarity on the issue of, is there a settlement at
24 this point or not. And I think it's like the elephant in the
25 room. I think it's clear to everyone, but the issue needs to

1 be addressed.

2 And, Your Honor, I also have a procedural question
3 relating to that, relating to the hearing tomorrow. Last
4 night there was an informative -- and you'll tell me if you
5 want to take that in that order or not. But last night there
6 was an informative motion filed by the -- by a group of -- I
7 think it's called the LCDC, saying that the Court -- that they
8 had reached an agreement with the Board that tomorrow the
9 Board would not be seeking -- I'm quoting now -- any rulings
10 regarding preemption of the constitutional priority for
11 constitutional debt currently proposed to be compromised
12 pursuant to the Plan of Adjustment.

13 So literally those words are, okay, meaning that the
14 Board is still arguing preemption, but -- and that's the
15 clarification we're seeking -- but not with respect to GO
16 bonds, because the instruments we're dealing with tomorrow are
17 not GO bonds. If that's the case, then we have nothing to
18 say. We're okay with that, and the hearing should proceed as
19 planned. But if the Board is saying, and I don't think that's
20 what they're saying, if the Board is saying that they're not
21 pursuing preemption at all, we need to know that, because the
22 hearing -- we would need more time to pick up the mantle on
23 that point.

24 We've had an exchange of e-mails just before this
25 call, and I believe that what I stated is accurate, meaning

1 that the Board is not abandoning the preemption argument.
2 It's just the Board is just clarifying that it's not seeking a
3 preemption argument with respect to GO bonds, but I think we
4 should clarify that today so that there's no confusion as to
5 what happens tomorrow.

6 So these are the two points I want to make. Sorry
7 that it took longer than I thought. Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Despins.

9 Mr. Bienenstock, would you like to respond?

10 MR. BIENENSTOCK: Yes. Thank you, Your Honor. And
11 good morning again.

12 THE COURT: Good morning.

13 MR. BIENENSTOCK: Mr. Despins and I spoke yesterday,
14 so what I'm saying is probably not news to him, but I think
15 it's important for the record. We do not believe, the Board
16 does not believe that COVID-19 is a legally cognizable ground
17 to provide the Committee control over a claim objection.

18 Additionally, as is evident from the Proposed Plan of
19 Adjustment on file, the settlement of the GO priority claim is
20 a central --

21 MS. SELDEN: Excuse me.

22 THE COURT: Just one moment.

23 MS. SELDEN: Judge, I'm sorry to interrupt, but the
24 AT&T line dropped.

25 THE COURT: All right. Thank you.

1 So we will have to wait until the AT&T line is
2 restored. So let's be quiet.

3 MS. NG: Hi. Can anybody hear me?

4 THE COURT: I can hear you.

5 MS. NG: Judge, are you there? I don't know what
6 happened. Everything just -- I don't know. I got
7 disconnected from everything.

8 THE COURT: All right. Ms. Ng, you're back.

9 MS. NG: I'm back.

10 THE COURT: Is the AT&T line back?

11 MS. NG: It is, Your Honor. The AT&T line is fine.

12 THE COURT: So we can proceed? The press and public
13 line --

14 MS. NG: Yes. If you could give it a second so
15 everyone can log back in.

16 THE COURT: Is that what all the beeping is?

17 MS. NG: Yes. That's all the beeping.

18 THE COURT: Okay. That was only like four or five
19 beeps. So tell us when you see enough log-ins where you think
20 we can go forward.

21 MS. NG: Okay. I just want to make sure. Can Carmen
22 or Amy hear me?

23 COURTROOM DEPUTY: Yes, Lisa. Thank you.

24 MS. NG: Okay. Okay. Can any of the attorneys just
25 let me know that you can hear me?

1 UNIDENTIFIED PERSON: We can hear you.

2 MS. NG: Okay. Let me just check with somebody who's
3 on the AT&T line. I just want to make sure everything is
4 okay.

5 Okay. Judge?

6 THE COURT: Yes, Ms. Ng.

7 MS. NG: I think we are all good. The AT&T line can
8 hear us and the attorneys can hear us. Okay.

9 THE COURT: Very good.

10 Welcome back, everyone. We had a technical
11 difficulty, but I understand that both the attorney lines and
12 the public lines are functioning again now.

13 And so, Mr. Bienenstock, would you resume with
14 explaining your response to Mr. Despins' remarks?

15 MR. BIENENSTOCK: Yes, Your Honor. And thank you.

16 As I stated, the short answer is that we do not
17 believe that COVID-19 is a legally cognizable ground to
18 provide the statutory committee control of the dispute over
19 the priority of the GO claims. Mr. Despins referred to
20 Professor Skeel's statement at the last public hearing.
21 Professor Skeel also reaffirmed the Board's wanting to go
22 forward with a debt restructuring. And to accomplish that,
23 we -- as I think the Court may recall, the Board had to
24 certify a new fiscal plan when it did, because by July 1, it
25 needs a new budget for the coming fiscal year that starts

1 July 1.

2 And so to provide the Commonwealth enough time to
3 propose a budget under the timetables and schedules in
4 PROMESA, the fiscal plan had to be certified when it was last
5 week. That, in turn, was a certification without the Board or
6 anyone, for that matter, having enough data to know the crux
7 of the ultimate impact of COVID-19 on the economy of Puerto
8 Rico. And as the Board has always said, it changes its fiscal
9 plan either when it finds it made an error, or when there's
10 new evidence on a material issue, new information, it adjusts
11 it.

12 So as evident from the Proposed Plan of Adjustment on
13 file, settlement of the GO priority claim is a very important
14 component of the settlement. And there's no reason to believe
15 that even if the settlement is changed in light of the impact
16 of COVID-19, that that would not remain a primary focal point
17 or component of the settlement. So the last thing the Board
18 would want is for such an important issue in the settlement to
19 be highjacked and litigated when it may never have to be
20 litigated.

21 So, you know, right now, as Mr. Despins said, there's
22 nothing on file. We are not about to declare the PSA over,
23 even if the likelihood is that it has to be adjusted. All --
24 virtually every proposed plan in a Chapter 11 or a Chapter 9
25 or now in a Title III case, prior to the disclosure statement,

1 and sometimes after the disclosure statement and before
2 confirmation gets amended. That's not a reason, in our view,
3 to take away from the Oversight Board and the main parties to
4 the settlement the power over resolving the GO priority issue.

5 As to Mr. Despins' question about tomorrow, we -- to
6 my knowledge, I've been pretty intimately involved with the
7 stay relief pleadings, we've never requested, as part of that
8 relief, a ruling on the preemption of the GO priority claim,
9 and we're not going to change that position now. As the Court
10 knows, and all the litigants know, preemption is a very
11 important component of that hearing. But it's not preemption
12 of the GO priority claim. It's preemption of prePROMESA
13 appropriations and things of that nature.

14 So I don't think, at least in our --

15 THE COURT: I'm sorry, Mr. Bienenstock. You're not
16 planning to press the -- what has been referred to as the
17 Title III preemption aspect of your preemption argument in
18 this Lift Stay Motion practice, only the Title II budget
19 appropriation oriented aspect of the preemption argument?

20 MR. BIENENSTOCK: Well, I'll -- let me state what we
21 will urge. We're definitely urging the Title II preemption.
22 In terms of what Your Honor just referred to as the Title III
23 preemption, I'll -- we did make the argument, and I'll --
24 we'll continue with it, that to the extent the obligation of
25 the Commonwealth, if it is a legal obligation, and I don't

1 want to argue tomorrow today, but to the extent there is,
2 if --

3 THE COURT: Those are --

4 MR. BIENENSTOCK: But to the extent there is an
5 obligation of the Commonwealth to transfer or appropriate
6 money to instrumentalities, such as PRIFA and the like, what
7 are known as the clawback entities, we would -- we have argued
8 and we will continue to argue that that obligation is not a
9 priority claim. And to the extent someone argues that under
10 Puerto Rico law it is a priority claim, we would say that that
11 is preempted by Title III.

12 I don't think that really is what Mr. Despins was
13 getting at, but I'm grateful for the Court for raising that
14 nuance, and hopefully I clarified what we are saying and what
15 we are not saying for tomorrow.

16 THE COURT: So that argument is focused on clawback
17 entities as opposed to the GOs?

18 MR. BIENENSTOCK: That's correct, Your Honor.

19 THE COURT: Thank you for that clarification.

20 MR. DESPINS: But to be clear, Your Honor -- this is
21 Luc Despins -- I was not -- I've never argued that they were,
22 in that proceeding, arguing the preemption against the GO
23 bonds. I just want to make sure that the Title III preemption
24 argument would still be made, and I think we just got that
25 confirmation, so that issue is resolved.

1 THE COURT: Thank you.

2 MR. ROSEN: Your Honor, it's Brian Rosen. If I could
3 just add one thing to what Mr. Bienenstock said.

4 The PSA has certain milestones in it. None of those
5 milestones have been passed at this point. We continue to
6 work with the PSA creditors and with Judge Houser as the Court
7 appointed mediator to address any issues associated with
8 timing and any further discussions that we're going to have on
9 the PSA.

10 As Mr. Bienenstock said, we have not -- no one has
11 taken any action to terminate the PSA, and we're continuing to
12 talk with all parties in light of what has occurred on the
13 island.

14 THE COURT: And you do have a date for a further
15 status report set by Court Order, correct?

16 MR. ROSEN: That is correct, Your Honor. July 15.

17 THE COURT: Thank you. Thank you.

18 I will now turn to the status report, or any further
19 comments of AAFAF. Mr. Rapisardi?

20 MR. FRIEDMAN: Your Honor, it's Peter Friedman.

21 AAFAF has no further comment with respect to the status
22 report. And we appreciate your recognizing that detail. If
23 there are any specific questions, I think Mr. Marini may also
24 be able to answer them on the operations of the Puerto Rico
25 Government.

1 THE COURT: Thank you, Mr. Friedman. As I noted, I
2 found your report quite clear and comprehensive, and so I have
3 no further questions of you.

4 Do any other counsel who are on speaking lines have
5 questions or comments that they wish to make in connection
6 with the status report? Just state your name if you want to
7 be called on.

8 (No response.)

9 THE COURT: All right then. It appears that there
10 are no other questions.

11 Again, my thanks for the status reports and for the
12 conversation between the Oversight Board's representative and
13 the UCC's representative that helped to clarify further the
14 status of certain matters.

15 And so we will now turn to Item II on the Agenda,
16 which is contested matters. The first of which is the Status
17 Conference on Cobra Acquisition's Motion for Allowance and
18 Payment of Administrative Expense Claims. And I have a time
19 allocation of five minutes for Mr. Qureshi, representing
20 Cobra, to start. Mr. Qureshi.

21 MR. QURESHI: Thank you, Your Honor. Good morning.
22 For the record, Abid Qureshi, along with my partner, Tom
23 McLish, from Akin, Gump, Strauss, Hauer & Feld, on behalf of
24 Cobra.

25 Your Honor, my plea to the Court this morning is

1 grounded in what we view to be basic considerations of
2 fairness and of equity. As Your Honor knows, Cobra believes
3 that it is owed in excess of 250 million dollars, a little
4 more than 60 million of which is on account of taxes that
5 Cobra paid to Puerto Rico and that we believe PREPA is
6 contractually obligated to reimburse us for.

7 The delay in these proceedings, Your Honor, is
8 extremely harmful to Cobra and to Cobra's employees, but we
9 submit also to all of PREPA's creditors. And, Your Honor,
10 that is because each month that Cobra's claim remains
11 outstanding puts the PREPA estate at risk for additional
12 interest liability in the approximate amount of two million
13 dollars per month, which of course we think greatly exceeds
14 the cost of litigating the dispute.

15 Your Honor, we have been waiting for many months to
16 have the opportunity to move this dispute forward and at least
17 to get closer to final resolution by this Court. And the two
18 events that the debtors have continued to use to justify the
19 continued delay are the pending criminal proceedings that
20 involve Cobra's former president and former FEMA officials, as
21 well as FEMA's ongoing analysis of Cobra's contract. And,
22 Your Honor, those two events simply have no end in site.

23 As we now know, the criminal trial has been delayed
24 until January of 2021. And of course nobody will be able to
25 say now whether that will, in fact, proceed on that date or

1 might be further delayed.

2 And as to the FEMA review process, which to be clear,
3 we don't believe there's any relevance here, but in any event,
4 Your Honor, the last guidance that Cobra is aware of is that
5 FEMA was to complete that process by May 29. May 29 has come
6 and gone, and as far as Cobra is aware, that process is
7 neither complete, nor has FEMA provided any further guidance
8 as to how much longer it will be outstanding. And, therefore,
9 Your Honor, we think that certain steps could be taken now to
10 at least start to get this dispute ready for trial.

11 One, we could begin the discovery process with
12 respect to the factual issues that have been raised by both
13 parties. Clearly it will take some time to get the matter
14 ready for trial. We don't see any prejudice to any parties in
15 getting that process going now.

16 And the second thing, Your Honor, that we could do in
17 addition to or as an alternative to the first is brief what we
18 think is a legal issue with respect to whether the services
19 that were provided by Cobra are actually and necessary costs
20 and expenses of preserving the PREPA estate. While we
21 understand there will be factual disputes that require
22 discovery with respect to the precise amount of those
23 invoices, we certainly think that legal issue could be
24 advanced now.

25 So in conclusion, Your Honor, we believe that basic

1 principles of fairness and equity require that we be permitted
2 to at least make some progress towards our day in court and to
3 get the process going. We don't think that continued delay at
4 this point serves any purpose of the PREPA estate. To the
5 contrary, it just exposes PREPA to needless potential
6 additional expense.

7 I'm happy, of course, to answer any questions the
8 Court may have. Thank you, Your Honor.

9 THE COURT: Thank you. I have no questions for you
10 at this point. And so I will turn to the Oversight Board's
11 representative.

12 MS. WAXMAN: Good morning, Your Honor. Hadassa
13 Waxman --

14 MR. DAVIS: Good morning.

15 THE COURT: So who is going to speak?

16 MR. DAVIS: Hadassa will.

17 MS. WAXMAN: Good morning, Your Honor. I just wanted
18 to introduce myself and to say good morning to Your Honor.
19 Hadassa Waxman on behalf of the Oversight Board. My colleague
20 is going to address the issue, if that's okay.

21 THE COURT: That's fine. So good morning, Ms.
22 Waxman. And is it Mr. Davis?

23 MR. DAVIS: Yes, Your Honor. Good morning. How are
24 you?

25 THE COURT: Very well. Could you state your full

1 || name for the record, please?

2 MR. DAVIS: Joseph Davis of Greenberg Traurig for
3 PREPA, and in this capacity, the government parties.

4 Your Honor, thank you for giving us some time this
5 morning to address this. As Your Honor put in the recent
6 order denying the most recent motion from Cobra, the issues
7 involved in this dispute are intertwined with the proceedings
8 that will be addressed in the criminal trial in January, and
9 also have a bearing on the reasonable cost analysis that FEMA
10 is in the process of completing or is -- that's our
11 understanding.

12 The original date -- let me start with that latter
13 point. As Mr. Qureshi is absolutely correct, we have not
14 heard yet from FEMA as to the status of that reasonable cost
15 analysis. It had an estimated completion date of May 29. We
16 have been assured that they were going to meet that deadline,
17 but for reasons unknown to us, it was not met, and we are
18 still awaiting FEMA's determination as to the reasonable cost
19 analysis of the Cobra contracts.

20 I would expect that to be happening soon, but we
21 don't control that process. FEMA does. In light of the
22 criminal trial date, though, I don't believe that the May 29
23 deadline is as important as it might otherwise be. The real
24 driving force here, of course, is the deadline or the
25 commencement date of the criminal proceedings in January.

1 In terms of the issues here, Mr. Qureshi made a
2 couple suggestions. One is to start discovery now. Given the
3 costs that are going to be associated with starting discovery
4 and the issues that are ultimately going to be tried --

5 THE COURT: Please. Hold on just one minute, please,
6 Mr. Davis.

7 Ms. Ng, I think I heard another, like a drop tone.
8 Is everything all right with the AT&T line?

9 MS. NG: Judge, yes. Everything's fine so far. Just
10 give me one second and let me check with one of the people
11 that are on. Hold on.

12 Judge, can you hear me?

13 THE COURT: Yes, I can hear you.

14 MS. NG: Yes. The AT&T line is good so far.

15 THE COURT: Okay. That's fine. I thought I was
16 hearing a couple of lines, a couple of noises. So we'll
17 continue.

18 Sorry for the interruption, Mr. Davis. Please
19 proceed.

20 MR. DAVIS: Oh, not a problem, Your Honor. We're all
21 learning on the fly here as to how the new world of virtual
22 courts operate.

23 As in terms of the discovery process, Your Honor,
24 discovery is obviously going to be expensive. This is a
25 detailed analysis of some 200 invoices. It's not going to be

1 done -- there is no broad, sweeping mechanism for addressing
2 issues. This is, in essence, a form of construction
3 litigation, which by its nature gets somewhat granular, and
4 that's what would happen here.

5 To conduct that discovery, we would have to be
6 dealing with government parties that are currently, as you
7 know, on lockdown, to track down documents and witnesses that
8 are currently largely not working at their offices and are
9 focused on other issues having to do with overall power
10 restoration and power provision under these circumstances.
11 Given the importance of the upcoming criminal trial in
12 January, many of these issues will be dealt with in that, and
13 a more appropriate time to do this is after that point.

14 As for his other comment, which is we should be
15 briefing something now, again, since the briefing is going to
16 be tied into a factual inquiry, and the factual inquiry is not
17 being conducted right now, we don't really see any benefit to
18 having further briefing in advance of discovery.

19 We hear their concern that somehow they're entitled
20 to interest, but they have to first prove they first have a
21 claim before they get to their concerns of interest, and the
22 interest concerns are, frankly, those of the estate, which is
23 to say the government parties, as opposed to a creditor.

24 So, Your Honor, I'm happy to answer any questions
25 that you have, but those are really the key points that I

1 wanted to address.

2 THE COURT: So I think I heard implicitly in your
3 last statement that the government parties are aware of the
4 theoretical exposure, financial exposure point that Mr. Davis
5 has made, and have taken the judgment that that is a risk that
6 is appropriate for PREPA to take at this stage?

7 MR. DAVIS: Yes, Your Honor.

8 THE COURT: All right. Mr. Qureshi, anything
9 further?

10 MR. QURESHI: Your Honor, the only thing I would add
11 is that to the extent the Court does not allow us to proceed
12 now, and to the extent that ruling is on account of the
13 COVID-19 situation and lockdown with respect to the various
14 government parties and others, we would just ask for another
15 early status conference in the very near future so we can
16 address again whether at that point it would be appropriate
17 for discovery to proceed, again to the extent Your Honor is
18 not inclined to allow us to proceed today.

19 Thank you, Your Honor.

20 THE COURT: Thank you.

21 For the reasons that I stated in my recent Order, and
22 because of the practical considerations relating to COVID-19,
23 and the still outstanding outcomes of the FEMA investigation
24 and the criminal prosecution, I am going to maintain the stay
25 in place.

1 I know that it is very problematic for Cobra. I have
2 been told today that PREPA has done its risk assessment as
3 well and has made its judgment that it is still not in the
4 interests of PREPA to proceed with discovery or further
5 litigation at this time given the issues that PREPA
6 anticipates raising with respect to underlying liability and,
7 to the extent there is liability, with respect to the
8 propriety of administrative expense priority. But PREPA has
9 acknowledged that after the criminal charges have been
10 resolved, it may be in a position productively to pursue
11 discovery.

12 And so the stay will remain in effect. I will enter
13 an order to that effect, and also directing the Oversight
14 Board to file an informative motion as to the status of the
15 FEMA investigation and the status of the criminal case one
16 week before the December 2020 Omni.

17 So, Mr. Davis, you'll be getting your marching orders
18 in that regard in writing, but do you understand that
19 obligation?

20 MR. DAVIS: Yes, Your Honor. Thank you.

21 THE COURT: Thank you very much. And thank you
22 both.

23 We now turn to Item Two of the contested matters,
24 which is the Oversight Board's motion to direct Ambac to
25 withdraw its complaint against Metropistas, which is pending

1 in the District Court. That is docket entry number 12569 in
2 case 17-3283 and docket entry 756 in case 17-3567.

3 I have as the first speaker, for 14 minutes,
4 Mr. Firestein for the Oversight Board.

5 MR. FIRESTEIN: Good morning, Your Honor. It's
6 Michael Firestein. I will be -- I'm not Mr. Barack. Can you
7 hear me?

8 THE COURT: Yes, I can. Good morning, Mr. Firestein.
9 Do you want to reserve time for rebuttal?

10 MR. FIRESTEIN: I did, Your Honor. I think in the
11 Agenda, we had reserved five minutes for me to close it out
12 after potential Metropistas observations before that.

13 THE COURT: Actually, I'm not sure whether I have
14 this right. I actually have you down for 14 minutes to start,
15 and then 14 minutes to come back with rebuttal after three and
16 a half minutes from Metropistas.

17 MR. FIRESTEIN: I think that would be too many
18 minutes. I think the way it works, Your Honor, is we had
19 split it, 22 and a half between the sides. So 14 on the
20 opening remarks. Then Mr. Glenn is going to speak for his
21 portion. And then Metropistas' counsel will speak for three
22 and a half, if it wishes to. And I'll take the remaining five
23 on the back end.

24 THE COURT: Thank you very much for helping me to
25 correct my tally sheet here. All right. Then we will start

1 your time for argument now.

2 MR. FIRESTEIN: Thank you.

3 This motion concerns Ambac's myriad violations of the
4 automatic stay in connection with its pursuit of its recently
5 filed Complaint and the debtor's effort to seek this Court's
6 assistance in directing Ambac to withdraw. Anything less than
7 an order directing withdrawal of the Complaint would allow
8 Ambac to flout the automatic stay, and without having sought
9 Court permission, seek to rescind or avoid a contract between
10 HTA and Metropistas in violation of 362(a)(3), seek a
11 declaration enforcing a security interest in HTA's property in
12 violation of 362(a)(4), and recover on a claim against the
13 debtor in violation of 362(a)(1) and (6).

14 Ambac offered a lot of excuses for its conduct,
15 including trying to run away from its own allegations in the
16 Complaint, but those efforts fall flat. The truth is that
17 Ambac, again without seeking relief, a procedure that Ambac
18 knows well, tried to end run the automatic stay, but got
19 caught at it. They violated the stay, and under any analysis,
20 are without standing or legal basis to pursue the claims.

21 I know the Court has reviewed the briefing, but I
22 want to take a moment to lay out a couple of important
23 background facts. In 2011, HTA and Metropistas entered into a
24 toll road concession agreement, and pursuant to that
25 agreement, HTA granted Metropistas a multi-year concession to

1 operate toll roads and then assign Metropistas certain of the
2 toll road revenues in exchange for a fee in excess of a
3 billion dollars.

4 Five years later, HTA and Metropistas entered an
5 extension agreement that the Court has read about, which
6 extended the concession rights for an additional ten years,
7 increased the share of certain toll revenues to Metropistas in
8 exchange for an additional payment of 150 million dollars to
9 HTA, and an agreement by Metropistas to make investments in
10 the tolling gantries, and some other terms as well.

11 Importantly, in May of 2016, Ambac filed suit
12 against, among others, HTA to seek the appointment of a
13 receiver and a TRO to prevent the then Governor from using the
14 additional money received from Metropistas for purposes other
15 than paying the bonds that Ambac insured. Even more
16 importantly in that litigation, Ambac did not challenge the
17 terms of the extension agreement or seek to rescind it. Ambac
18 expressly admitted it was not seeking any relief that would
19 have the effect of unwinding the agreement.

20 The Court denied Ambac's request for temporary relief
21 on the grounds that Ambac wasn't likely to prevail on the
22 merits; and thereafter, the case languished, and once these
23 Title III cases were filed, was stayed by the automatic stay.

24 Fast forwarding several years, Ambac filed this
25 Complaint only against Metropistas, and alleged three causes

1 of action: One for rescission, one for unjust enrichment, and
2 one for declaratory relief. Again, Ambac didn't seek relief
3 from stay. So why does Ambac violate the stay here and why do
4 its excuses provide it with no cover?

5 The most straight forward violation is as follows:
6 Count I of the Complaint is for rescission. Paragraph 80 flat
7 out states, "Ambac seeks an order rescinding the extension
8 agreement." Under Puerto Rico law, that means rescission in
9 total. The contract in question stands or falls altogether,
10 with all of its provisions. If there's rescission, the parties
11 must be put in the position they were in before the contract.

12 There's no partial or limited rescission under Puerto
13 Rico law. Naturally, that would require return of the money
14 received by HTA, a relinquishment of potential future sharing
15 of revenues, perhaps a removal of the tolling gantries that
16 are now operating on the highways, and likely a secession
17 of -- by Metropistas of its ongoing maintenance. That's a
18 textbook case of violating 362(a)(3).

19 Ambac attempts to escape that conclusion by arguing
20 the return of that consideration is rank speculation. It
21 isn't. That is what rescission requires. Ambac argues that it
22 only seeks rescission to the extent necessary to satisfy its
23 claims, but that concept has no basis in the law. There is no
24 limited rescission where one side gives up what it has and the
25 other side gets to keep theirs.

1 Ambac endeavors to run away from its Complaint by
2 arguing it seeks only money damages and only from Metropistas,
3 but that concept has no foundation in the law. Ambac's
4 tortured interpretation derives from its read of a provision
5 in the Puerto Rico Code, Section 3499, but as we've pointed
6 out, that statute appears in the section of the Code regarding
7 rescission, and is only triggered when rescission is possible.
8 Ambac presents nothing to suggest that a return of money or
9 the other consideration is impossible, and we can all think of
10 examples where that might be the case.

11 It also doesn't matter, as Ambac suggested, that the
12 party -- excuse me, that the action was brought against a
13 third party, in this case Metropistas, as opposed to the
14 debtor. As noted by the Court in the *Kaiser* case, "The
15 protection of the automatic stay extends to any action or
16 proceeding against an interest in the debtor. The scope of
17 this protection is not determined solely by who the party
18 chose to name in the proceeding, but rather by who is the
19 party with a real interest in the litigation."

20 There is no question that's HTA here. Ambac sued for
21 recission. It's stuck with the Complaint that it filed and
22 the relief that flows from it, not the Complaint it wished it
23 filed or attempted to rewrite in its opposition.

24 But there are more violations. The Complaint seeks a
25 declaration that it has a security interest in HTA's property

1 which violates 362(a)(4). The Complaint alleges it has a lien
2 on various elements of HTA property, including taxes and
3 vehicle fees that this Court has heard so much about, in
4 addition to the toll revenues, even future toll revenues,
5 which the Court has also heard much about. But the existence
6 or lack thereof of such a lien on future toll revenues of HTA
7 is one of the centerpieces of the revenue bond adversary
8 proceedings.

9 And yet, without seeking relief from the stay, Ambac
10 unilaterally filed this Complaint. Putting aside the forum
11 shopping attributes, or the risk of obtaining differing or
12 conflicting judicial outcomes, that is exactly what 362(a)(4)
13 is intended to protect against.

14 Ambac again seeks to skirt that conclusion by arguing
15 it merely seeks to affirm its lien on revenues collected by
16 Metropistas for its own account, because the lien supposedly
17 continued to when Metropistas was transferred whatever toll
18 revenues it gets, but that exalts form over substance. The
19 escrow agreement confirms that the money collected from tolls
20 by Metropistas are jointly owned by HTA and Metropistas. HTA
21 continues to have an ownership in those funds, and it doesn't
22 magically get transferred to Metropistas.

23 But in any event, Ambac's argument is really too cute
24 by half. A lien is a claim against property. Ambac admits
25 its lien was granted by HTA, not Metropistas. So any effort

1 to make a claim against Metropistas necessarily involves a
2 matter regarding a lien vis-a-vis HTA, and just because HTA
3 isn't named doesn't mean that HTA isn't involved to address
4 that lien in question.

5 But Ambac's violations go even beyond this. Ambac
6 unabashedly seeks to recover payment on a claim against the
7 debtor, in this case, HTA. Paragraph seven of the Complaint
8 makes this clear. Ambac alleges that it seeks, quote, to
9 reclaim hundreds of millions of dollars in value that was
10 fraudulently transferred to Metropistas to secure payment of
11 obligations HTA owes to Ambac. That violates 362(a)(1) and
12 (a)(6). And obviously we cite a number of cases throughout
13 the papers, across Circuits, to support that argument.

14 The reason for that violation is simple, and merely
15 suing Metropistas doesn't cure the issue. Any recovery by
16 Ambac against Metropistas could easily lead to a claim by
17 Metropistas against HTA, and in the absence of stay relief,
18 that burden should not be imposed on the debtor.

19 Now, Ambac places great reliance --

20 THE COURT: Just a question --

21 MR. FIRESTEIN: Do you have a question, Your Honor?

22 THE COURT: Yes, I do. Wouldn't relief for Ambac
23 against Metropistas necessarily involve a determination that
24 there is -- there was wrongful conduct by HTA, that the
25 contract is not legitimate? And HTA, of course, has contract

1 rights, and so would that not be an effort to undermine or
2 eliminate HTA's contract rights as well?

3 MR. FIRESTEIN: Most assuredly. Ambac tries to run
4 away from that piece by focusing only on the so-called bad
5 faith that it believes it needs to prove against Metropistas,
6 but the Court is exactly right. In connection with whatever
7 evidence would come forward, Ambac is going to have to delve
8 into the origins of this contract, how it was negotiated; and
9 to that extent, it clearly is going to impact contract rights
10 of HTA.

11 So in connection with this (a) (1) and (a) (6)
12 violation, Ambac, of course, places reliance on the *Unisys*
13 case to avoid the stay violation, but *Unisys* is unavailing as
14 the facts there are wholly different for two reasons: One,
15 there was an express abandonment by the trustee of the claim
16 in question. Not so here. And more importantly, and as the
17 Court in *Unisys* made clear to point out, there was only one
18 creditor, so that -- only one creditor who could be impacted
19 if the stay was not applicable. That's clearly not the case
20 here. So once, twice, three times over, Ambac has violated
21 the stay.

22 But beyond that, Ambac spends a lot of time arguing
23 that it has standing to pursue its claims, as if the stay
24 violations were less relevant or don't apply. But in any
25 event, standing is not a panacea. It doesn't absolve or

1 excuse Ambac's violations. And in any event, Ambac doesn't
2 have standing to assert the claims.

3 Centrally, Ambac argues the claims that it alleges,
4 or at least some of them, were abandoned by the Oversight
5 Board by not having brought them within the two-year
6 limitation period set forth in Section 546. This failure --
7 and that somehow that magically or automatically confers
8 standing, allowing Ambac to file them without seeking relief.
9 But the Bankruptcy Code and PROMESA doesn't allow for such
10 automatic reversion, and the arguments here are straight
11 forward.

12 There isn't anything in 546 to suggest a two-year
13 limitation to file an avoidance claim applies only to the
14 trustee. Ambac doesn't cite a case to the contrary. If they
15 wanted to pursue such a claim, they should have brought a
16 motion under 926 like this Court has seen. Any other result
17 would wrongly afford no discretion to the debtor's decision
18 not to bring a particular claim. And regardless, the
19 underpinning of Ambac's theory of abandonment, be it express
20 or constructive, is without merit. Section 554 is not
21 incorporated into PROMESA, and there's no other source of
22 abandonment authority that Ambac presents. They talk about
23 it, but cite nothing.

24 And there has to be a judicial determination of
25 abandonment, and there's no notion of constructive abandonment

1 in the law applicable here. Reversion doesn't happen
2 magically, and the cases that Ambac cites to this effect don't
3 control.

4 In fact, the *Tribune* case from the end of last year
5 speaks to the notion that it has no basis in the Code at all.
6 And further, the approach makes sense. It gives appropriate
7 and relevant discretion to the debtor's decisions about how
8 and what claims to pursue, which is rooted in 305 and utilizes
9 the holistic approach this Court has found necessary for the
10 continuation of government function.

11 Lastly, Your Honor, abandonment or the so-called
12 reversion aside, Ambac's asserted unjust enrichment claim
13 doesn't belong to Ambac. It belongs to HTA, as the Court
14 noted. It's HTA's contract. If anyone is damaged by an
15 unjust enrichment, it would be HTA and all of its creditors,
16 not just Ambac.

17 Ambac's purported injury is derivative to an injury
18 to HTA creditors as a whole. And as the *Artesanias* Court
19 noted, a trustee cannot relinquish claims belonging to the
20 estate for the benefit of a single creditor, which is what
21 Ambac is trying to do.

22 In any event, the unjust enrichment claim is not
23 subject to the two-year limitations period under 546. The
24 right to bring that action hasn't expired and remains with
25 HTA, if it ever wanted to bring it, and it certainly hasn't

1 been -- hasn't reverted or been abandoned.

2 Your Honor, the motion should be granted. Unless the
3 Court has questions, I'll reserve for rebuttal.

4 THE COURT: Thank you, Mr. Firestein.

5 I'll turn now to Mr. Glenn for Ambac.

6 MR. GLENN: Good morning, Your Honor. Can you hear
7 me?

8 THE COURT: Good morning.

9 MR. GLENN: Thank you. Andrew Glenn, Kasowitz,
10 Benson, Torres, LLP, on behalf of Ambac Assurance Corporation.

11 The debtors have asked the Court to force Ambac to
12 withdraw its Complaint solely against Metropistas based on a
13 purported violation of the automatic stay. As I will explain,
14 because the 546(a) deadline had elapsed for bringing these
15 claims on behalf of the debtors, the claims automatically
16 reverted to Ambac and, indeed, any other creditor that has the
17 right to bring them under state law. And there is nothing in
18 PROMESA that bars or preempts them.

19 The debtors are not --

20 THE COURT: Mr. Glenn, Mr. Firestein has just argued
21 that whether -- well, he certainly argues against your
22 reversion theory, but says that even if you did have the right
23 to bring this sort of action on your own behalf, because of
24 the effect that the relief you're seeking would have on the
25 contract rights and other determinations of -- rights that are

1 ultimately at HTA, it would still be violative of the
2 automatic stay.

3 And so I'll hear what you want to say on this
4 reversion argument, but I am principally interested in what
5 you want to say about how it is that an action that seeks
6 recission of a contract to which HTA is a party, that seeks a
7 determination of a lien that is rooted in a grant originally
8 allegedly by HTA, and that seeks to declare that a contract
9 entered into by HTA is one that provided for unjust enrichment
10 doesn't violate the automatic stay.

11 MR. GLENN: Yes, Your Honor.

12 So we're all familiar with the Bankruptcy Code's
13 avoidance actions, and what those actually prolong -- the
14 Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance
15 Act, all those statutory regimes use the word "avoid" or
16 "annul" in connection with a transfer. The Puerto Rico
17 statute --

18 THE COURT: May I stop you for one more second?

19 MR. GLENN: Yes.

20 THE COURT: There's a bit of a sort of percussive
21 feedback sound when you speak. Are you using the computer
22 microphone or are you using a headset?

23 MR. GLENN: I'm using a headset. Is that better now,
24 Your Honor?

25 THE COURT: Say testing, one, two, three.

1 MR. GLENN: Testing, one, two, three.

2 THE COURT: A little better. Go on, please.

3 MR. GLENN: Thank you. I'll try to improve that.

4 Anyway, those statutory regimes use words like

5 "avoid" or "annul" a transfer. The Puerto Rico Fraudulent

6 Conveyance Statute uses the word "recission." We don't

7 dispute that. And what the complaint says is that, we seek

8 recission under that statute only to the extent necessary to

9 pay our claims. That's all we seek.

10 THE COURT: And how is that a legal concept? What is
11 the cite for that concept?

12 MR. GLENN: If you look at the statutory provision
13 that we've cited, which the Oversight Board has only
14 selectively quoted, there's two relevant provisions. Where,
15 as here, property has been transferred, but recission is
16 impossible for any reason, for any reason whatsoever, the
17 statute says, Your Honor, the transferee is obligated to
18 indemnify the plaintiff in that case for the losses and
19 damages for the fraudulent transfer.

20 And this is completely --

21 THE COURT: What makes transfer impossible here? I
22 understand it would be complicated, painful, and have far
23 reaching implications, but why does that make it impossible?

24 MR. GLENN: Because it's barred by the automatic
25 stay. And that's actually -- we agree with the debtors --

1 THE COURT: The impossibility argument is rooted in
2 the existence of the automatic stay?

3 MR. GLENN: Correct. It's impossible for any reason
4 whatsoever. And in fact, Section 3495 of the same provision
5 of the rescission statute in Puerto Rico states, "When an
6 action for rescission is a subsidiary one, it may be enforced
7 only when the person injured has no other legal remedy to
8 obtain reparation for the injury."

9 So what this --

10 THE COURT: Section (b) (2) provides for an
11 application for relief from the automatic stay.

12 MR. GLENN: It does.

13 THE COURT: So where's your impossibility? The stay
14 is there. There's a mechanism in PROMESA, which is adopted
15 from the Code, to ask for relief from the automatic stay.

16 MR. GLENN: It does, Your Honor. But if you read
17 Section 3495, it says that that is the course of last resort.
18 And no case has ever held, under these circumstances, that
19 there is no action for rescission, fraudulent conveyance,
20 where, as here, there is a money damages remedy for a
21 fraudulent conveyance plaintiff.

22 In fact, as I've indicated, under the Bankruptcy
23 Code, this same issue applies. And under state law, all the
24 fraudulent conveyance statutes offer two alternatives to
25 plaintiffs. One is to rescind, annul, avoid the transaction

1 in their entirety. And secondarily, it's to get money
2 damages. And so that's all we seek. And if we're wrong about
3 that, we will not prevail against Metropistas.

4 And I think that's the point. They want you to make
5 a determination as a matter of law on these points. And
6 there's no reason to protect Metropistas, who we believe
7 committed a fraudulent conveyance in a no-bid auction while
8 the Commonwealth and HTA were in distress. That -- our client
9 should be allowed to recover its damages for that.

10 And it's a traditional fraudulent conveyance claim.
11 Someone paid less than what they should have for the rights
12 they obtained. And by virtue --

13 THE COURT: And given that -- Mr. Glenn, given that
14 the underlying contract that you say resulted, or was a
15 fraudulent conveyance, is one that is executory, is one that
16 HTA and Metropistas are expected to be bound together under
17 for a number of years, how can a determination that the
18 contract itself was a fraudulent conveyance not affect the
19 rights of HTA in that contract and, therefore, be implicated
20 by the automatic stay?

21 MR. GLENN: When a party obtains fraudulently
22 transferred property, that party can keep the property if they
23 pay the damages that represent the value they should have paid
24 in the first instance. So there's nothing -- and in fact,
25 Mr. Firestein talks about consequences that might involve the

1 Oversight Board down the road, but they've cited none.

2 They've cited none.

3 And every fraudulent conveyance action which seeks
4 this monetary recovery does not require the third party to
5 divest itself from the assets it obtained. All that it seeks
6 is that they pay more than what they should have paid. So
7 there's not going to be a disturbance in any contractual
8 relationship between the debtor and Metropistas, and they've
9 cited that.

10 They've said a lot of things about potential
11 consequences down the road, but they're all conclusory.

12 There's no facts. There's no explanation for what they've
13 done. And so at the end of the day, the debtor in any
14 fraudulent conveyance action is going to be party to the
15 transaction that gave rise to that fraudulent conveyance.

16 So the debtor is always going to have some
17 relationship to the fraudulent conveyance claim, but that
18 doesn't mean that the debtor's rights are going to be
19 divested, offset, or even affected by that fraudulent
20 conveyance claim. And in fact, if we prevail, all that will
21 happen is that Metropistas will have to pay us additional
22 consideration, which we believe it should have in the first
23 instance.

24 That's the bedrock of every fraudulent conveyance
25 claim. And if there were some consequence that occurred as a

1 matter of law when this happened in other circumstances, I
2 would have expected them to say that. So --

3 THE COURT: Thank you.

4 MR. GLENN: Thank you. So we think that the
5 provisions of the statute, although different in the
6 terminology from Section 548 of the Bankruptcy Code, operative
7 provisions of governing state law are essentially
8 substantively the same. The foundation of fraudulent
9 conveyance law is that there's an annulment, a rescission, and
10 avoidance of the obligation; but the remedy in an action for
11 rescission here would be payment of monetary damages.

12 I also would venture to say that if we ever did file
13 a motion to lift the automatic stay, that that would be
14 strenuously opposed by the Oversight Board to bring this
15 claim, it would be strenuously opposed by Metropistas, so we'd
16 be right back where we are today indicating that rescinding
17 the contract, which is not the object of our action, would be
18 an impossibility and those provisions of the Code of rescission
19 in Puerto Rico apply to us as well.

20 Now, in terms of standing and reversion, I will touch
21 on those briefly.

22 THE COURT: I would just like to ask my timekeeper
23 what her count is of the time now?

24 MS. SELDEN: Twelve minutes remaining, Judge.

25 THE COURT: Thank you.

1 Please go on, Mr. Glenn.

2 MR. GLENN: Thank you.

3 We've cited, contrary to Mr. Firestein's suggestion,
4 a -- what they concede in their papers as a litany of cases
5 standing for the proposition that when the 546(a) deadline for
6 the debtor to bring 544(b) claims which belonged to the debtor
7 before the bankruptcy, that those revert automatically to the
8 operative creditors after the deadline passes. And that's
9 obvious, because those claims never belonged to the debtor
10 before the bankruptcy.

11 It gives the debtor a two-year exclusive period to
12 bring those claims if it chooses to, as Mr. Firestein says, in
13 its discretion. Why? Because it's bringing the claims in a
14 representative capacity on behalf of all the creditors.

15 That doesn't mean that the claims don't revert after
16 the two-year period, as Mr. Firestein suggests. All the cases
17 we cited --

18 THE COURT: Mr. Glenn, are you still there?

19 MR. GLENN: Yes. I'm going to switch to my headset.
20 I'm sorry. Is that better?

21 THE COURT: Ms. Ng, can you hear me?

22 MR. GLENN: Hello? Hello?

23 THE COURT: Can anyone hear me?

24 MR. GLENN: I cannot hear --

25 MR. FIRESTEIN: Yes, Your Honor.

1 UNIDENTIFIED PERSON: Yes, we can.

2 UNIDENTIFIED PERSON: Yes, Your Honor.

3 UNIDENTIFIED PERSON: Yes, Your Honor.

4 THE COURT: It appears that my line has dropped.

5 MS. NG: Judge, we can hear you.

6 MR. FIRESTEIN: We can hear you.

7 MS. SELDEN: We can hear you, Judge.

8 MR. GLENN: Can you hear me, Your Honor?

9 MS. NG: No, I think she -- can you guys hear me?

10 This is Lisa.

11 MR. GLENN: We can.

12 MR. FIRESTEIN: We can.

13 MS. NG: She may not have been able to hear you.

14 That's why she's probably logging off and logging back in. So
15 just give her a few minutes. I'm sorry about that.

16 THE COURT: This is Judge Swain. Can anybody hear
17 me?

18 MR. GLENN: I can.

19 MR. FIRESTEIN: We can.

20 MR. GLENN: Yes, Your Honor.

21 THE COURT: All right. I don't know what happened.
22 For some reason, I ceased to hear anyone.

23 So, Mr. Glenn, you can hear me?

24 MR. GLENN: I can hear you fine.

25 THE COURT: Ms. Ng, can you hear me?

1 MS. NG: Yes, Judge. We could hear you before, but I
2 guess you weren't able to hear us. We heard you perfectly.

3 THE COURT: All right, then. Sorry about that.

4 So --

5 MR. GLENN: Where was I, Judge?

6 THE COURT: We all are back again.

7 You were talking about how the claims that revert are
8 brought in a representative capacity.

9 MR. GLENN: Yes.

10 THE COURT: And so if you would go on with that.

11 MR. GLENN: Sure.

12 So we've cited a bunch of cases for the proposition
13 of this automatic reversion. And the reason why we don't have
14 to seek relief from the Court is that that two-year period has
15 elapsed. And we're not seeking to bring the claim in any
16 representative capacity. We're bringing it solely on our own
17 behalf.

18 And there's no cases that stand for the proposition,
19 none, that we ever had to seek approval to bring these claims
20 on our own behalf. We agree that in a non-Chapter Nine,
21 non-Title XI -- non-Title III case, that if we wanted to bring
22 them on behalf of the bankruptcy estate, we would have had to
23 file a motion. But there's no case that says that after the
24 546(a) deadline expires and the claims are no longer viable by
25 the bankrupt entity, that a creditor has to seek leave of the

1 Court.

2 In -- the *Unisys* case, which Mr. Firestein tries to
3 distinguish, is well on point. There, there was an
4 abandonment of the claim under Section 554. Now, that was
5 because the claim was still within the two-year 546(a) period,
6 and so abandonment was necessary for the claim to go to the
7 individual creditor. There's nothing in that case, a First
8 Circuit case, that says that stay relief is needed. Nothing.
9 It says very clearly that once there's an abandonment, or in
10 our case, a reversion, the claim is free of any need to
11 address the automatic stay.

12 Mr. Firestein argues that because there was no --
13 only one creditor in that case, that that's somehow an issue,
14 but it wasn't an issue. The Court held, as a matter of law,
15 that the application of the automatic stay did not apply at
16 that point in time based on abandonment.

17 I think the only distinction here is that because
18 there is no Section 554 abandonment in PROMESA, that we
19 couldn't have sought abandonment of the claim within that
20 two-year period. But the automatic reversion, which Circuit
21 Courts have held applies under 546(a), still applies, and
22 there's no reason why it shouldn't apply here.

23 Now, moving on to the issues of our lien and unjust
24 enrichment. The toll revenues of HTA that are subject to the
25 concession extension were pledged to Ambac and other

1 bondholders. So as a matter of law, it's our position that we
2 did have a lien on these tolls.

3 Now, the difference between what happened with the
4 concession in 2011 was that the proceeds of the concession
5 agreement were paid to the bondholders. That did not happen
6 with respect to the concession extension. So it's our
7 position that the lien was never discharged. And much like a
8 party who owns a house, you can't sell the house free and
9 clear of the lien unless you satisfy the mortgage, or state
10 law allows you to sell free and clear of the lien. So we're
11 not asserting any claims against HTA property, even though we
12 once had a lien against those tolls while they were property
13 of HTA.

14 Now, they've cited in their Reply for the first time
15 the escrow agreement. The escrow agreement does not provide
16 a, quote, ownership interest in all the tolls for all reasons.
17 It's a ministerial contract that allows for the splitting of
18 those tolls as required under the concession agreement. So an
19 escrow agreement does not provide a broader beneficial legal
20 interest in the tolls themselves. It's merely a mechanic so
21 that the tolls, once they are paid, are split as required
22 under the contract.

23 And our Complaint says very clearly that all we are
24 seeking are the tolls that go to Metropistas, again for its
25 own account, and, therefore, there's no lien, no assertion of

1 a lien in our Complaint against any debtor property. And it's
2 very clear. And, therefore, there is no stay violation at
3 all.

4 We have to file a proof of claim asserting liens
5 against the company. Just because we once had liens against
6 the company doesn't mean that, by asserting those liens
7 against a third party, that we're asserting a claim against a
8 debtor. Otherwise, actions against insurers, guarantors,
9 other third parties would automatically be deemed against the
10 debtor, and that's not the law.

11 Finally --

12 THE COURT: But in relation to -- Mr. Glenn, I just
13 want to make sure that I understand your argument and
14 understand the debtor's argument.

15 Here I understand the debtor to be saying that for
16 you to be found to have a valid lien on the property that has
17 gone into the hands of Metropistas, the toll piece that goes
18 to Metropistas, there will have to be a determination that you
19 had a lien on that property when it was in the hands of HTA.
20 And that is something that is being litigated even now.
21 That's not, you know, a question that's been determined.

22 And so by seeking to litigate that, you are seeking
23 to put yourself in a legal position that does affect HTA.

24 MR. GLENN: I disagree with that strenuously. Just
25 because, as a matter of proof, you know, in our action against

1 Metropistas, we have to prove that we once had a lien, that
2 doesn't have any effect on the company. That only has an
3 effect on Metropistas. And that means that if we're right,
4 then Metropistas has to hand over the money to us in 2051
5 through 2061, when it collects those tolls.

6 I think you have to distinguish between, on the
7 automatic stay point, evidentiary proof with the actual remedy
8 that we're seeking. And the remedy is really the determinant
9 of whether we're violating the automatic stay or not.

10 And I don't mean to undermine or characterize other
11 aspects of the litigation that are being handled by the
12 Milbank firm, so I'm not going to comment beyond that. And
13 I'm not conversant in the interplay between what's going on
14 with that Lift Stay litigation and this Complaint, but looking
15 at the face of the Complaint, which is the relevant inquiry
16 for the automatic stay, all that will be determined is whether
17 Metropistas -- when those tolls are collected by it, put in
18 its bank account, would have to be paid to us. That's it.

19 It's not an action against the debtor. It's an
20 action against the third party, and it does not violate the
21 stay. Same goes for our unjust enrichment claim.

22 Our position is that we had a property right in those
23 tolls subject to our lien. If we are correct about that, and
24 those funds were supposed to be paid or are supposed to be
25 paid to us, then we've been deprived of those tolls. And

1 conversely, Metropistas has been unjustly enriched, because it
2 knew of our lien and it understood its obligation based on the
3 payment of our lien from the first concession agreement, that
4 it should have paid those concession proceeds to us. And
5 because it didn't, it must pay them in the future as we go
6 forward.

7 So I would urge the Court to look at the plain
8 language of the statute, which the Oversight Board has
9 conspicuously omitted in its papers. Impossibility, for any
10 reason; the *Unisys* case, which says that the claims are free
11 of the stay, full stop; and the fact that reversion is
12 automatic under the litany of cases. All the major concepts,
13 all the major arguments they're putting forward today, Your
14 Honor, have no support in case law or the statute.

15 And if you look at the cases they've cited, the ones
16 they do cite, like *Tribune*, which involved the application of
17 the safe harbor defense in 546(e), had nothing to do with
18 whether claims revert as a matter of law to creditors, as the
19 cases we've cited actually hold.

20 So unless Your Honor has any further questions, that
21 concludes my presentation.

22 THE COURT: Thank you, Mr. Glenn.

23 And so now I call on Mr. Martorana from Metropistas.

24 MR. MARTORANA: Good morning, Your Honor. Keith
25 Martorana from Gibson, Dunn & Crutcher on behalf of

1 Metropistas. Can you hear me okay?

2 THE COURT: Yes, I can. Thank you.

3 MR. MARTORANA: Great. Thank you.

4 As Your Honor is aware, Metropistas filed a joinder
5 to the FOMB's motion, and I think it goes without saying that
6 we fully endorse all the arguments of the FOMB's counsel, both
7 in those briefs and at the hearing today.

8 Your Honor, we had asked for a small amount of time,
9 I think 3.5 minutes, to address this Court really for the
10 purposes of addressing any factual issues that might need to
11 be corrected or to answer any questions that Your Honor might
12 have. While I don't have any factual concerns that would need
13 to be addressed, I did want to speak very briefly on one point
14 that was raised just now by counsel for Ambac.

15 Your Honor, one of the cornerstones of Mr. Glenn's
16 arguments is that indemnification is appropriate because the
17 automatic stay makes rescission impossible, but I'm personally
18 not aware of any cases stating that the automatic stay can be
19 used as a basis for impossibility under Puerto Rico law. And
20 Ambac hasn't cited any cases in that respect either.

21 Indeed, my understanding of the impossibility cases
22 under Puerto Rico law is that they speak to true physical
23 impossibility, i.e., situations where the subject property is
24 actually destroyed. And as Your Honor has noted, the remedy
25 here would be for Ambac to at least try to lift the automatic

1 stay.

2 At this point, Your Honor, I don't have anything else
3 to add. However, we're at your disposal to the extent that
4 you have any questions. At this point, unless Your Honor has
5 questions, I think I would cede the rest of my small amount of
6 time to the FOMB's counsel for the rebuttal.

7 THE COURT: Thank you. I have no further questions
8 for you, Mr. Martorana.

9 And so, Mr. Firestein, I think you're conceded about
10 two minutes.

11 MR. FIRESTEIN: All right. With any luck, I won't
12 use it all, but let's see.

13 Can you hear me, Your Honor?

14 THE COURT: Yes, I can.

15 MR. FIRESTEIN: Perfect. Again, Michael Firestein of
16 Proskauer on behalf of the debtor.

17 Let me start at basic principles. I really don't
18 think that Mr. Glenn said anything that contradicts the
19 position that we've articulated. And I want to focus
20 principally on the issue that was emphasized by the Court,
21 which is the stay violation issues, and the simple fact that
22 they didn't seek relief from it.

23 There is no excuse for that, and I want to make a few
24 basic points about it. They don't dispute that they sued for
25 recission. They're trying to dress it up as something

1 different, but in fact, they are seeking rescission. And under
2 Puerto Rico law, that means that rescission has the effect of
3 voiding a contract from its inception, i.e., as if it never
4 existed, which is the *Peer International Corporation* case that
5 we cited in our Response. They focus on the issue of
6 impossibility, but I agree with Mr. Martorana, and I was
7 surprised by Mr. Glenn's comment that his understanding of
8 impossibility is the existence of the automatic stay.

9 As the Court properly pointed out, that is what the
10 statutory provision allows for relief for. If you have a
11 basis to seek relief, you should go and do it. It is not the
12 basis of impossibility. Impossibility, as described in our
13 papers and as is well understood, is where it's just not
14 physically possible.

15 I mean, one can think of the -- if the consideration
16 was a steak, a piece of meat that is considered -- available
17 for return, then you have the notion of impossibility. But
18 the existence of the automatic stay doesn't create that type
19 of impossibility, and it doesn't help them if they are seeking
20 only, as they claim, to recover against Metropistas.

21 I think it is not a far reach to suggest that if
22 Metropistas is called upon to return money somehow based on
23 some notion of the contract -- guess who they're going to turn
24 around and level a claim against? And guess what it's going
25 to be about? It's going to be about the issue of the lien

1 that these folks are claiming that they have.

2 They don't debate the fact that the lien is -- that
3 they claim is on future toll revenues, but as this Court
4 pointed out, that is precisely one of the issues that's being
5 litigated in this Title III -- in this Title III court.

6 I think that the notion of their stay violation is
7 pretty apparent. They are seeking to enforce or validate a
8 lien. They are trying to impact rights that HTA has in a
9 contract. They are basically doing everything that the
10 sections of 362 that we cite to are designed to prevent. And
11 the cases are all over the place. I mean, there are many
12 cases that say it doesn't matter that you're just suing
13 Metropistas. You have to look at the gravamen of the issue.

14 I do want to, if I can, Your Honor, just to state for
15 a moment this issue of reversion, and I want to read a quote
16 from the *Tribune Company* case, which I think is square on
17 point, which was at the end of 2019 in the Second Circuit.
18 The Court states, a critical step in the logic of appellant's
19 theory finds no support in the language of the Code. In
20 particular, the inference that fraudulent conveyance actions
21 revert to creditors if either of the two-year statute of
22 limitations passes without an exercise of the trustee's powers
23 under Section 544 or the 362 stay is lifted by the Bankruptcy
24 Court, has no basis in the Code's language.

25 It doesn't happen by magic. And the legend of -- or

1 the legion of cases that Mr. Glenn reports that they've cited
2 to, and I believe it's in paragraph 43 of their Opposition,
3 each one of them is sort of a clever quotation and use of
4 ellipses as to exactly what the cases are saying. And I could
5 go through each one of them, but let me just highlight a
6 couple.

7 In the -- and I'll probably mispronounce it -- the
8 *Gronczewski* case, the central element of that is the trustee
9 claims he didn't have, or she didn't have any interest in the
10 property.

11 In the *Klingman* case, the cases that the *Klingman*
12 Court cite to, in most instances, the bankruptcy itself was
13 closed. And it says -- and it says nothing about the
14 requirement to seek stay relief in any -- in any event -- in
15 any event. Excuse me, Your Honor.

16 All of these cases don't speak to reversion. They
17 only speak to the general proposition that the trustee has two
18 years. And perhaps a creditor could have standing, but there
19 needs to be certain determinations. And those determinations
20 require that there is an abandonment of the property and some
21 other items that we've identified in our papers.

22 But in any event, unjust enrichment is not a claim
23 that would revert under 546 or 544, even if it did exist.
24 That claim has always been HTA's. But this Court doesn't
25 really even need to address that standing issue, if it doesn't

1 wish to, because the stay violations are still relevant,
2 applicable and obvious.

3 And unless the Court has any further questions on
4 that score, I'll submit.

5 THE COURT: Thank you, Mr. Firestein. And thank you
6 all for these arguments, which are very helpful.

7 I take this motion under submission, and will issue a
8 written decision in due time. Thank you.

9 And so now the third matter on the contested calendar
10 is PREPA's Motion to Assume Certain Contracts, which is docket
11 entry number 12579 in case 17-3283 and docket entry 1951 in
12 case 17-4780.

13 I have the counsel for the Oversight Board and PREPA
14 up for initial remarks of 18 minutes, and then ultimately
15 coming back for rebuttal of five minutes. And so would
16 counsel for the Oversight Board please introduce himself and
17 begin?

18 MR. POSSINGER: Yes, Your Honor. Thank you. Paul
19 Possinger, Proskauer Rose, on behalf of the Oversight Board in
20 its capacity as representative of PREPA in the Title III case.
21 Also on the line is Mr. Kelly Malone of King & Spalding,
22 counsel to PREPA, who participated in the negotiation of the
23 amendments of the contracts that are the subject of this
24 motion. Additionally, we have Fred Sosnick of Shearman &
25 Sterling, counsel to ECO, who will address the Court when I

1 conclude my opening remarks.

2 Your Honor, this is PREPA's motion to assume two
3 major prepetition executory contracts, a power purchase
4 agreement with EcoElectrica, LP, and a natural gas supply
5 agreement with Gas Natural Aprovisionamientos, which I'll call
6 Naturgy. These contracts have been in place for years or
7 decades prior to the filing of PREPA's petition and have been
8 amended post petition through months of negotiation and
9 several layers of approval, including by the Puerto Rico
10 Energy Bureau and the Oversight Board.

11 I'll briefly describe the contracts and the relevant
12 facts, which are all set forth in the contracts themselves
13 attached to the motion and the supporting declaration of
14 Fernando Padilla of PREPA.

15 Pursuant to the EcoElectrica power purchase
16 agreement, PREPA purchases power from a private natural gas
17 generation facility that sits adjacent to the Costa Sur
18 generation plant on the south coast of Puerto Rico, which is
19 fueled by natural gas supplied by Naturgy. Under the Naturgy
20 contract, PREPA purchases the liquid natural gas that supplies
21 the Costa Sur units five and six, as well as -- and also
22 supplies liquid natural gas to fuel the ECO plant.

23 Both contracts rely on liquid natural gas imported by
24 Naturgy to the LNG terminal that is owned and operated by ECO
25 at Penuelas, which is in the region, and is, in fact, the only

1 liquid natural gas terminal in the region. The ECO contract
2 has been in place since 1995, and is set to expire in March of
3 2022. The Naturgy contract has been in place since 2012, and
4 is set to expire in December of this year. Together, these
5 contracts source up to 40 percent of the power generation in
6 Puerto Rico.

7 PREPA's Certified Fiscal Plan from May of 2019
8 recognizes how critical these contracts are to PREPA, but
9 contemplated renegotiating certain of their terms to achieve
10 fiscal savings targets. PREPA entered into these negotiations
11 in July of 2019, and those negotiations concluded in October
12 of 2019.

13 The result -- the resulting amendments to the
14 contract in so much -- both contracts were extended until
15 September of 2032. The fuel supply was restructured so that
16 PREPA buys liquid natural gas from Naturgy through the ECO
17 terminal, for both the ECO facility and Costa Sur units five
18 and six. And ECO, in turn, supplies power at an increased
19 capacity at a lower cost.

20 There are also changes in the liquid natural gas
21 price structure under the Naturgy contract. As described in
22 Fernando Padilla's declaration, PREPA estimates savings of
23 over 100 million dollars a year as a result of these
24 amendments, which will be passed through onto rate payers.
25 There's also an increase in capacity from the ECO facility,

1 which provides PREPA flexibility to use less power from its
2 more expensive and potentially less reliable plants that are
3 operated by PREPA using a different fuel mix.

4 I would say, most importantly, the contracts will now
5 remain in place for another 12 years, which secures a major
6 power source on the island where there is no viable
7 replacement that currently exists. And this period will allow
8 for a period of time for the retirement or replacement of the
9 Costa Sur facility.

10 These amendments meet the savings targets of the
11 Certified Fiscal Plan. They're compliant with Puerto Rico
12 Energy policy and PREPA's -- also compliant with PREPA's
13 current Integrated Resource Plan. The amendments went through
14 an extensive series of reviews. And first, after the three
15 months of negotiations for the amendments, definitive
16 documents were presented to and approved by PREPA's governing
17 board in October of 2019.

18 The amendments were then submitted to the Oversight
19 Board, which conducted a thorough review and analysis to
20 ensure that savings targets were met. The Oversight Board
21 approved both amendments in December of 2019. Concurrently,
22 the amendments were submitted to the Puerto Rico Energy Board
23 in November of 2019, which conducted a thorough process that
24 concluded in March of this year, with an order approving both
25 amendments. So all in, Your Honor, this has been an

1 eight-month process, extensive negotiation, and several layers
2 of independent and regulatory review on approval.

3 So those are the relevant facts here. I'll turn to
4 the standard for assumption under Section 365(a). Simply put,
5 the standard is whether the amendments here are a sound
6 exercise -- I'm sorry. The assumption of the amended contract
7 is a sound exercise of PREPA's business judgment, meaning that
8 the decision to assume the contracts will provide some benefit
9 to the debtor, and are not based on whim, caprice, bad faith,
10 or gross negligence.

11 As a general matter, this is a highly deferential
12 standard based on the bulk of the case law that we cite. In
13 PREPA's case, and as the Court has recognized in Your Honor's
14 Order in January of this year denying the appointment of the
15 Section 922 trustee in the ERS case, the discretion of the
16 Oversight Board as PREPA'S representative is entitled to even
17 greater deference.

18 The Oversight Board is tasked not only with assuring
19 some recovery to creditors, but also strategic decision making
20 to arrive at holistic solutions for Puerto Rico, and in this
21 case, PREPA and its customers. The assumption of these
22 contracts easily satisfies this standard.

23 As I described, it was an extensive and thorough
24 review process to ensure savings targets are met, capacity
25 levels are increased, or greater flexibility away from other

1 less reliable or more expensive plants. And the contracts
2 assure a major source of power generation for the next 12
3 years.

4 THE COURT: May I?

5 MR. POSSINGER: It was designed to -- I'm sorry.

6 THE COURT: I wanted to -- I guess finish your
7 remarks about the process. I would then like to focus on
8 whether this amended contract is the prepetition agreement.
9 That is an issue that has been raised and one about which I
10 have true concern, about whether this comes within 365 so --
11 but first, finish your process comments.

12 MR. POSSINGER: Certainly. I would just conclude on
13 that point that the process was designed to achieve the goals
14 that I mentioned, and the process succeeded. These amendments
15 achieved these goals. They're good for PREPA. They're good
16 for Puerto Rico. And the assumption of the contracts more
17 than satisfies the business judgment standard.

18 With respect to the arguments that the objectors have
19 asserted regarding novation, all units are -- both of them
20 assert that the contracts can't be assumed because they're not
21 amendments but they're brand new contracts under Puerto Rico
22 law principle of passive novation.

23 For starters, Your Honor, I would note that this
24 argument is self-defeating. If these are, in fact, new post
25 petition contracts, we really don't need to be here, because

1 PREPA can simply execute the contracts and implement them
2 subject only to review and approval by the Oversight Board and
3 PREB, which have already been obtained.

4 THE COURT: I understand that is your position, and
5 there's no Section 363, so it's a logical position, but if I'm
6 being asked to exercise authority, I need to be comfortable
7 that what I'm being asked to do is within my authority.

8 MR. POSSINGER: That's understood.

9 THE COURT: And I have here amended contracts that
10 use superseder language, and the ordinary meaning of
11 superseding means something that leaves the previous thing
12 behind, that nullifies and replaces the previous thing. And
13 there seems to be Puerto Rico Supreme Court authority that
14 says that such a clause extinguishes the prior contract. So
15 I'm wrestling with that a bit.

16 MR. POSSINGER: I understood, Your Honor. And we're
17 here because we concluded that that's not the case, that these
18 are the same prepetition executory contracts that had been
19 amended through the renegotiation process.

20 Under Puerto Rico law, a novation would happen either
21 by the express intent of the parties, or where the contracts
22 are so thoroughly amended that they have little or nothing to
23 do with the original contract. Neither happened here. Both
24 contracts state clearly the parties intend to amend and
25 restate the original contracts. That statement of intent is

1 entitled to substantial deference under Puerto Rico law.

2 Neither amendment altered the fundamental nature of
3 the original contract here. Under the ECO contract, PREPA
4 still buys power from the ECO plant. It buys more capacity,
5 it has a lower price, but it's simply an amendment from the
6 prior arrangement.

7 Under the Naturgy contract, PREPA still buys liquid
8 natural gas. It now buys it for both plants and under a
9 different cost structure, but the fundamental nature of both
10 contracts remains unchanged.

11 Under Puerto Rico law, a passive novation has not
12 occurred here. These contracts are simply amendments to the
13 contracts that existed prepetition.

14 With that, Your Honor, I'll return to address the
15 standard that you --

16 THE COURT: So I should -- I'm sorry. I was just
17 trying to find the precise language, but I'll just ask the
18 question more generally. And so I should -- in determining
19 what the contract by its terms expresses -- I should accept
20 and focus on the word "amendment", and ignore the provisions
21 in the merger clauses that say that the contract supersedes
22 prior agreements?

23 MR. POSSINGER: Under Puerto Rico law, the contracts
24 are only novated if they are completely -- if they address a
25 completely different subject matter essentially.

1 THE COURT: Well, that's one of the prongs, but the
2 other prong is whether there is an expression of an intention
3 to extinguish the old contract. And here I have a contract
4 term that says this supersedes all prior agreements.

5 MR. POSSINGER: In effect, Your Honor, by amending
6 and restating the contract, rather than taking the original
7 contract and do an amendment that goes through, you know, term
8 by term, a very complex contract, and do a separate amendment
9 document, for the sake of convenience, these contracts were
10 amended and restated.

11 They are amendments. They are amendments to the
12 original contracts that, again, under the ECO contract,
13 provide for a supply of power, under the Naturgy contract,
14 provide for a supply of natural gas. The original nature of
15 the contracts remains in place, and they've simply been
16 amended by these amendments.

17 THE COURT: Thank you.

18 MR. POSSINGER: Returning to the standard, UTIER has
19 argued that the Court should adopt a more strident standard of
20 balance of the equities; in turn, it should be a summary
21 proceeding on the narrow business judgment inquiry that I
22 described, into a full-blown trial under public policy
23 provisions, to replace the conclusions of the Oversight Board,
24 and an independent regulator, with their own.

25 To push this, they cite three cases: *Bildisco*,

1 Supreme Court decision in *Bildisco*; Fifth Circuit decision in
2 *Mirant*; and the Sixth Circuit decision in *FirstEnergy*. All of
3 these cases involve the debtor seeking to unilaterally reject
4 contracts in contravention of federal labor or federal energy
5 policy.

6 Here, not only is there no applicable federal policy,
7 there's no contract rejection and there's no dispute with the
8 independent regulator. Certainly no dispute with the
9 Oversight Board.

10 As I indicated, PREPA has approved these amendments
11 and certainly haven't opposed assumption. There's no basis
12 whatsoever to apply the heightened standard that they
13 described. The correct standard here is the business judgment
14 standard.

15 I will address a few other points raised by the
16 objectors. The first related to ripeness. All argue -- both
17 objections argue the motion isn't ripe for adjudication,
18 because the PREB regulatory process isn't complete. That's
19 wrong for two reasons. First of all, PREB presented a final
20 order approving the amendments. We understand the objectors
21 filed motions to intervene in the PREB process and reconsider
22 this Order, as -- motions were filed a month and a half after
23 the Order was entered, and almost a month after this motion
24 was filed.

25 Regardless, the PREB process is essentially ex parte.

1 It's between PREPA and PREB. There's no right to a third
2 party to intervene. They do have rights of appeal.

3 So the second reason, if they succeed in reversing
4 the PREB Order, we believe that's unlikely, but if they do,
5 the assumption order is not intended to undo that result.

6 We're not seeking to override PREB or preempt PREB. Although
7 the assumption of the contract is a necessary part of the
8 process to effect these amendments, assumption is no more or
9 less necessary than PREB approval or Oversight Board approval,
10 and there's no required order of events here.

11 So, but the Oversight Board approval has been
12 obtained. PREB approval has been obtained. And the motion to
13 assume is certainly ripe, as one of the final steps to get
14 these amendments into effect.

15 THE COURT: Now, if I were to find that this -- if I
16 were to find a novation here and, therefore, find that it is
17 improper for me to approve an assumption of this contract
18 under 365, what, if any, practical effect would that have,
19 given that PREPA can enter into contracts under PROMESA?

20 MR. POSSINGER: That may be more a question for
21 Mr. Sosnick. The practical and immediate effect would be that
22 there would be no assumption. Assumption of the contracts is
23 a condition precedent to the effectiveness of both. So to the
24 extent assumption is not obtained, I think the contracts would
25 have to be further amended to remove that condition so that

1 they could take effect.

2 THE COURT: Thank you.

3 MR. POSSINGER: Returning to a few points that the
4 objectors raise, UTIER argues PREPA could not have exercised
5 business judgment, because it had no alternatives due to ECO's
6 sole control over the only liquid natural gas terminal in the
7 region. That argument is also self-defeating. If PREPA has
8 no alternative for the supply of 40 percent of the power in
9 Puerto Rico, how can assumption be anything but the sound
10 exercise of business judgment?

11 They argue that PREPA was strong-armed, but there's
12 no factual support for this. Although ECO and Naturgy may be
13 the only option for liquid natural gas supply in this region,
14 PREPA, in turn, is their only possible customer. This is a
15 balanced negotiation between mutually dependent parties, and
16 the result is a significant savings to PREPA and its
17 customers.

18 Finally, Your Honor, I'll address briefly the point
19 on standing. Neither of these objectors have shown that they
20 have standing to oppose this motion. They all make the simple
21 argument that they're parties in interest under Section 1109,
22 that should be enough. But none of their arguments address
23 their interest as alleged creditors of PREPA. All they point
24 to are aspects of the contracts they don't like from a
25 politics standpoint.

1 They've alleged vague impacts on employees, on
2 environment, on rates charged to customers, but no impacts on
3 their alleged interests as creditors of PREPA. In fact, there
4 is no impact on their rights as creditors, to the extent they
5 are creditors. The cost of the Power Purchase Agreement and
6 the liquid natural gas supply as passed on to rate payers,
7 there's no effect on PREPA's assets or cash flow.

8 With respect to Environmental and Windmar, the only
9 injuries they argue relate to energy and environmental policy,
10 matters this Court has already ruled don't give rise to
11 standing in the context of their attempting opposition to the
12 9019 motion.

13 With respect to Windmar, it asserts its own business
14 interests in promoting renewable energy generation, again, not
15 its interest as a purported creditor of PREPA. The Court
16 similarly denied standing to oppose the 9019 motion on this
17 basis as well.

18 And finally, UTIER vaguely alleges prospective harm
19 to its members as PREPA employers and as rate payers. Again,
20 at bottom, this is a challenge to energy policy. It is not an
21 assertion of rights as creditors or interests as creditors in
22 this case. None of the objectors here have shown that they
23 have standing, and so the objection should be overruled on
24 that basis as well. And I ask that the motion be granted.

25 With that, unless the Court has any further

1 || questions, I would yield to Mr. Sosnick.

2 THE COURT: Thank you, Mr. Possinger.

3 Mr. Sosnick.

4 MR. SOSNICK: Good morning, Your Honor. Fred Sosnick
5 from Shearman Sterling on behalf of EcoElectrica.

6 Just to pick up on a couple of those items in the
7 brief time I have, I would point out to Your Honor that from
8 our perspective, this is very much the type of contract that
9 would be assumed as an amended contract under Section 365 of
10 the Bankruptcy Code.

11 I take the point that 363 does not apply, but in a
12 normal proceeding -- or in a Chapter 11 proceeding, not
13 normal, but in a Chapter 11 proceeding, these would normally
14 be handled as 365 amendments, not 363 new contracts anyhow.
15 And the reason for that, Your Honor, is that this is a
16 continuing contract to supply power to Puerto Rico.

17 I understand the Court's focus on the superseding
18 language, but I agree with PREPA's counsel that the purpose of
19 that language in this contract is these contracts, by
20 definition -- they've been amended over time at other
21 points -- can be -- unless you have a single document that
22 you're working off of, would be very difficult in the scope
23 of, you know, a document that covers almost 80 or 70 pages
24 without exhibits. It would just be very difficult to
25 understand and comprehend.

1 From our perspective, Your Honor, the way this --
2 what we were asked to do is to address two concerns in a
3 contract that ran through to 2022 for the EcoElectrica
4 contract. And those were to try to make the contract more
5 flexible so that PREPA could have the ability over time to
6 call more or less power, depending on what happens, and their
7 IRP, and how they bring on new renewables, and also to bring
8 about cost reductions today.

9 If we, on EcoElectrica's side, said we're not
10 interested in talking to you, that would have left PREPA with
11 two choices: It could have assumed the contract as-is, and
12 then come back to us in 2022 and had a discussion, or it could
13 have rejected the contract. And which is --

14 THE COURT: So just finish your point.

15 MR. SOSNICK: Yes. In which case, we would have been
16 without this contract providing baseload. And that's why, to
17 us, it was a renegotiation around terms to fit within the
18 continuation of a contract that provided this key source of
19 power to PREPA.

20 THE COURT: Thank you, Mr. Sosnick.

21 And now I will turn to UTIER's counsel, Ms. Mendez
22 Colberg.

23 MS. MENDEZ COLBERG: Yes, Your Honor.

24 THE COURT: I have you down for 15 minutes.

25 MS. MENDEZ COLBERG: Yes, Your Honor.

1 This is Jessica Mendez on behalf of UTIER. Can you
2 hear me okay?

3 THE COURT: Yes. Yes, I can. Thank you.

4 MS. MENDEZ COLBERG: Thank you. Well, good morning,
5 Your Honor.

6 THE COURT: Good morning.

7 MS. MENDEZ COLBERG: As I said, this is Jessica
8 Mendez on behalf of UTIER.

9 First, we want to submit to the Court that these
10 contracts, as Mr. Possinger stated, are major power purchase
11 and operation agreements. These are critical contracts that
12 have -- that have public interest concerns, as opposed to the
13 cases that PREPA has been citing in its documents.

14 So what we are asking the Court is a determination on
15 lack of jurisdiction and to find that assumption isn't proper
16 under the proper standard of review. So what we are asking
17 the Court is within the confines of this contested matter.

18 So with respect to the standing of UTIER, PREPA has
19 questioned whether UTIER has standing to object to the
20 extension of the contracts. But UTIER is a creditor and a
21 party in interest; and it has a right to appear and be heard
22 on any matter in this case, but especially when that matter
23 has a direct effect on UTIER's claim.

24 By assuming the contract, PREPA is not just assuming
25 the obligations that it had prepetition with EcoElectrica and

1 Naturgy, which were set to expire in 2022 and 2020. PREPA is
2 assuming ten to 12 years worth of new liabilities that will be
3 granted an automatic administrative expense priority in this
4 case. So evidently, it is not the same to grant priority to
5 liabilities of a few months or a couple of years as a decade
6 or more. This obviously affects UTIER's claims as an
7 unsecured creditor.

8 Now, PREPA has argued that being a party in interest
9 is not enough, and it has cited cases that address formality
10 issues. But with respect to -- but those are with respect to
11 Section 365(d)(4). Now, UTIER is not objecting on the basis
12 of a formality. It's objecting under constitutional and
13 prudential principles and under Section 365(a), which is
14 subject to the Court's review and requires benefit to the
15 estate.

16 Now, the benefit to the estate is benefit to the
17 unsecured creditors, as much as anything else. If unsecured
18 creditors do not have standing to object to assumption when it
19 would be prejudicial to the estate, then the Court would rely
20 only on the word of the debtor who wants to assume the
21 contract and the nondebtor who wants the administrative
22 expense priority for its claim. So obviously, Section 365(a)
23 benefits the parties to the contract, but it also benefits the
24 bankruptcy estate, and, by inevitable consequence, the
25 unsecured creditors as well.

1 Now, with respect to the aspect of the ripeness for
2 adjudication, Mr. Possinger stated that the proceedings before
3 the Energy Bureau were final, but they are not. The Court --
4 if the Court does not deny the Motion to Assume, at least it
5 should hold this matter in abeyance until the process before
6 the Puerto Rico Energy Bureau is completed and the Order is
7 actually final.

8 Ripeness is a jurisdictional issue, as well as a
9 prudential one, and the Court should not waste its judicial
10 resources in matters that are not ripe. Actually, this
11 Court's own procedures for the assumption of power purchase
12 and operating agreements at docket 1199 require the Energy
13 Bureau's prior approval to assume a power purchase and
14 operating agreement.

15 And the Energy Bureau, as I mentioned, the Energy
16 Bureau's approval is not final. Yes, the Energy Bureau
17 approved the contracts on March 11, but due to the COVID-19
18 pandemic, all deadlines in the Energy Bureau were extended.
19 Therefore, four different motions, including our own, have
20 been filed before the Energy Bureau, none of which have been
21 ruled on yet.

22 Even if the Energy Bureau rules on these motions,
23 regardless of who it favors, judicial review in the state
24 court is available to the unfavored party. And actually, to
25 this day, other parties can still seek to -- timely

1 reconsideration on those proceedings, because the deadlines
2 have been extended to June 15. So -- and even if the Energy
3 Bureau denies a reconsideration, it may grant any other of
4 these motions, and regardless of the Energy Bureau's decision,
5 the judicial review is available even for PREPA.

6 PREPA contends that it has taken care of this problem
7 by amending its Proposed Order to say that it will not
8 override any decision by the Energy Bureau, but that doesn't
9 solve the issue that the Court does not have jurisdiction to
10 cede this contested matter if it's not ripe. To rule on this
11 matter would be, as I mentioned, a waste of the Court's
12 limited resources and would also create a burden on the Energy
13 Bureau.

14 Now, and also I would like to stress that PREPA
15 admitted that it is not seeking Court approval for the
16 assumption unless the PREB's Order remains final.

17 Now, with respect to the issue of these contracts
18 being new contracts, the Court should deny PREPA's motion,
19 because PREPA is trying to assume new contracts by calling
20 them amended contracts. Section 365 is only -- it's only for
21 assuming executory contracts, which must be pending
22 prepetition.

23 Now, PREPA contends that the contracts are not new,
24 because they are amended, restated agreements. However,
25 PREPA's own discovery in these proceedings show that this is

1 not the case. Under Puerto Rico law, an amendment constitutes
2 a new obligation when novation takes place. Now, novation can
3 be express or tacit, and if it is tacit, what the Court looks
4 for is the change in the nature on the contract.

5 Now, if Your Honor would look at the form -- the form
6 marked in our informative motion submitting the exhibits,
7 referring to Exhibit Four, when PREPA needed authorization for
8 the funds of the Naturgy contract, it marked the contract as a
9 new contract. And this document was submitted by Mr. Padilla
10 himself. So that's an admission of this contract being a new
11 contract.

12 Also, PREPA'S executive director has admitted that
13 the Naturgy contract can be considered a new contractual
14 obligation because Naturgy is the new supplier of natural gas
15 to PREPA for the EcoElectrica facility. So PREPA's own
16 discovery shows that this is a new contract by tacit novation.

17 Also, with respect to the EcoElectrica agreement, we
18 submit that it is also a new contract as well, because PREPA
19 itself has admitted that there are substantial changes to the
20 nature of the contract. The -- PREPA's executive director
21 said that the EcoElectrica contract has been substantially
22 amended so that it now takes the form of a tolling agreement,
23 which is a totally different structure for the contract
24 through PREPA, which will supply the natural gas to be
25 converted to electric energy in the EcoElectrica facilities.

1 Now, in the way that the contracts are now, PREPA
2 does not have that obligation to supply the natural gas to
3 EcoElectrica, so it is a substantial, a radical change of the
4 nature of the contract, including new obligations to the
5 parties. This is not just something that is extending
6 deadlines or due dates of the contracts.

7 THE COURT: If I were --

8 MS. MENDEZ COLBERG: Now, to be sure --

9 THE COURT: Ms. Mendez, if I were to agree with you
10 that this is a new contract, so that I don't have authority to
11 examine it under 365, there appears to be nothing in PROMESA
12 to stop PREPA from going ahead and amending the contract to
13 take away the condition precedent, but PREPA has the authority
14 to just enter into this contract without asking for my
15 approval. So to what benefit to UTIER would it be for me to
16 deny approval of assumption on the grounds of this being a new
17 contract?

18 MS. MENDEZ COLBERG: Yes, Your Honor. This is the
19 question that you asked about the practical effect to
20 Mr. Possinger. And with respect to the bankruptcy
21 proceedings, and UTIER, if the contract is assumed under 365,
22 it would entitle them to administrative expenses priority,
23 which is what we say injures UTIER as an unsecured creditor.
24 So that would be the effect of assuming the contract in the
25 bankruptcy proceedings.

1 And also, we would submit that the agency that has
2 the expertise to address the technical issues of these
3 contracts are within the Energy -- the Energy Bureau. So yes,
4 if the contract is a new contract, it doesn't require the
5 authorization of the -- the approval of this Court. It would
6 be in the hands of the PREB, who has the expertise, and we
7 would also intervene in those proceedings as well. But with
8 respect to the bankruptcy proceeding, it's about the
9 administrative expenses priority.

10 THE COURT: Thank you.

11 MS. MENDEZ COLBERG: So I wanted to address the
12 language of the contract, because, to be sure, just because
13 the parties include the language "amend and restate," that
14 does not negate the "will not" to novate the contracts. Under
15 Puerto Rico law, this kind of language does not indicate the
16 "will not" to novate, and with that respect, we've cited in
17 our motion various cases, including the *Ballester Hermanos*
18 case from the District Court.

19 And also, Your Honor was mentioning that the contract
20 explicitly says that this contract supersedes previous
21 agreements, so that goes to the express content of the
22 contract itself.

23 Now, with respect to the standard of review, the
24 appropriate standard here is the balance of equities. Now,
25 the contracts that PREPA wants to assume are special and

1 unique contracts which will have significant impact on a
2 myriad of interests.

3 Now, we'd obviously disagree with PREPA's
4 interpretation of the cases, the *Bildisco*, the *Mirant* cases,
5 as limiting the scope of the Bankruptcy Court's equity powers.
6 The focus of those cases is not on rejection nor on
7 regulation, it's on the interests that are effected due to the
8 nature of the contracts.

9 We are not aware of any case law that defines the
10 standard of review for assumption as different from that of
11 rejection. The general test for both is the business judgment
12 standard. But it stands to reason that if a contract should
13 be seen under the balance of equity standard, or rejection, it
14 can be seen under the same standard for assumption as well.

15 These cases took unique situations and considered
16 that the importance of the interests at stake warranted a
17 stricter standard. So there, as here, the business judgment
18 standard doesn't cut it. It's a highly differential standard
19 for such important contracts.

20 And with respect to that, we mentioned the two
21 interests involved that the business judgment standard does
22 not address, which are the effect on rate payers and the
23 effect on environmental management as well. So rate payers
24 are adversely affected by the negotiated terms of the
25 contracts, because they are charged for those payments that

1 PREPA has to make. And with respect to environmental effects,
2 Puerto Rico law mandates that PREPA transition towards
3 renewable energy, and here PREPA is committing to natural gas,
4 which is not a renewable energy source, for the next ten
5 years.

6 Now, with respect to the business judgment standard
7 itself, even if we considered that standard, PREPA has the
8 burden to show that the contracts benefited -- as a debtor.
9 Now, the EcoElectrica contract that PREPA wants to assume
10 imposes new burdens on PREPA. PREPA has not explained the
11 reasonability of the new payments on the contracts, and PREPA
12 is not fully protected under either contract from paying
13 EcoElectrica the capacity payment if, for example, Naturgy
14 fails to deliver the fuel.

15 And with respect to that, in PREPA'S Response to our
16 Interrogatories, it said that -- it has been saying that it is
17 fully protected, but yet in its Reply, in the Omnibus Reply,
18 it says that PREPA has mechanisms to mitigate. So those two
19 are not the same.

20 We already mentioned the effect on the creditors,
21 especially UTIER, with respect to the administrative expense
22 priority, and the negotiations with respect to these contracts
23 with PREPA establishes that -- are reasonable, but it actually
24 had no choice to give it in -- to give in to Naturgy's
25 request, with those that say that -- with respect to being a

1 business -- sound business judgment.

2 Naturgy's actions fit the description of a
3 monopolistic violation, such as the type of arrangement in
4 violation of the essential facility doctrine, because Naturgy
5 has used its control over the EcoElectrica terminals, which it
6 got through a tolling agreement with EcoElectrica, to make
7 itself the only available option if PREPA intended to use the
8 terminal, which it had to do.

9 So this made PREPA agree to a contract for natural
10 gas for EcoElectrica, which made it change the nature of the
11 EcoElectrica contract, skipping obviously the competitive
12 bidding process and agreeing to assume both contracts and the
13 Title III.

14 Now, lastly, PREPA excuses entering into these
15 contracts without competitive bidding under the sole source
16 exception, but this exception does not apply --

17 THE COURT: Please finish up concisely.

18 MS. MENDEZ COLBERG: Yes. To conclude, Your Honor,
19 we reiterate that the process before the Energy Bureau is not
20 final, so the Court should hold in abeyance these proceedings
21 or deny the Motion to Assume for the reasons that I already
22 stated and for the reasons stated in our motion.

23 Thank you, Your Honor.

24 THE COURT: Thank you, Ms. Mendez.

25 And now, Mr. Agrait for Windmar.

1 MR. AGRAIT: Good morning, Judge.

2 THE COURT: Good morning.

3 MR. AGRAIT: Can you hear me well?

4 THE COURT: Yes, I can.

5 MR. AGRAIT: Okay. I'll be very short, because
6 Attorney Mendez has covered most of the issues, but I would
7 like to go directly to the question you asked concerning the
8 new contracts.

9 PREPA itself submitted this to the PREB as a new
10 contract. And it was Mr. Jose Ortiz, executive director
11 himself, who said so. That's one.

12 Two, this contract, these new contracts, as opposed
13 to the first contract, provide for the possibility of bringing
14 to Puerto Rico natural gas from the United States, which would
15 make this interstate, which would require FERC intervention.
16 The first contract provides only for outside of U.S. sources
17 for gas, so it didn't have any component of interstate
18 transfer of NG. That in itself makes this contract a totally
19 different one than the first one.

20 Third, the risks in these contracts are altered
21 significantly. The commercial entity or the entity that would
22 buy the gas in the open market would be PREPA. It would
23 become either -- Naturgy gas by the tolling agreement, but the
24 person who would go out to buy the gas would be PREPA with --
25 when we don't know really what the expertise of PREPA is in

1 that field. But certainly it adds, adds a big risk to PREPA's
2 future, because it is -- in practical terms, if this is a new
3 contract, as we think, and the Court has no bearing on
4 approving this new contract, because PREPA can go into it
5 itself, it can go into it itself if it gets prior PREB final
6 approval.

7 And if it's a new contract, then it is subject to
8 Rule 8415 of PREB, which specifically requires competitive
9 procedures, which were not present here, among other reasons,
10 because it supposedly was just an assumption of an existing
11 contract. If this Court recognizes, as PREPA has admitted
12 now, not in its first motion, but at the other motions, that
13 this has to have PREB's prior final approval before the Court
14 decides, then what -- in a way, why are we here?

15 Why don't we go back to PREB, where the substantive
16 decision of whether these contracts comply or not with the
17 public policy of Puerto Rico, which is respected under PROMESA
18 law, which, as a matter of fact, mentions specifically the
19 PREB as an important entity in the further development of
20 Puerto Rico?

21 Why don't we go to PREB to have a final decision that
22 PREPA has admitted is needed, look at it as a new contract,
23 have it subject to the applicable regulation, which is
24 regulation 8415, and then the Court wouldn't have to be
25 involved in these issues? As a matter of fact, PREB would

1 give the balance of equity analysis that the parties -- the
2 opposing parties are requesting.

3 It is important, Your Honor, that the public policy
4 in Puerto Rico, on this field, which -- Law 17 of 2019 is not
5 only a substantive law, but it is also a procedural law on the
6 processes, transparency and participation of consumers in the
7 decisions of PREPA. If that participation is not granted,
8 it's not through PREB, which is the regulator, then the whole
9 process would be contrary to Puerto Rico public policy, Law 17
10 of 2019.

11 That would be my statement, Your Honor.

12 THE COURT: Thank you, Mr. Agrait.

13 And now, for five minutes, Mr. Santiago Sastre for
14 the Environmental Advocacy Group.

15 MR. SANTIAGO SASTRE: Good morning, Your Honor.

16 William Santiago Sastre on behalf of the Environmental
17 Advocacy Group. And am I speaking clearly?

18 THE COURT: Yes, you are.

19 MR. SANTIAGO SASTRE: Okay. First of all, I have to
20 state that my clients join all the arguments presented by the
21 UTIER and Windmar parties in their opposition to PREPA's
22 urgent motion for entry of an order to authorize the
23 assumption of the contracts in question, especially as to the
24 ripeness discussion that has been held today and also in the
25 pleadings.

1 Secondly, I want to clarify, for the benefit of the
2 Oversight lawyers, who exactly I represent and who composes
3 these groups. We are not creditors in the sense that PREPA
4 doesn't necessarily owe us money, but of the groups that I
5 represent, there are people that live adjacent to these
6 plants. They live right next to them, in Penuelas and
7 Guayanilla, two very small towns in the south side of the
8 island. And they have been struggling with the issues of
9 contamination in their area for years.

10 So, you know, I hope no one takes that lightly, you
11 know. We're not creditors. That's right. But we are
12 citizens, and the environment is being affected greatly by the
13 use of fossil fuels, and these contracts contemplate 12 more
14 years of fossil fuel use.

15 And in the case law that we cited in our Sur-reply
16 that was Ordered by the Court, which is at docket 2003 in the
17 PREPA proceedings, we cite cases which state that when an
18 energy company is the debtor, then issues of the environment
19 are relevant in regard to the standing of a party to appear
20 before the Court.

21 So I have to say that we definitely should have --
22 and your prior ruling, Judge, which they are relying on to try
23 to again exclude citizens from these proceedings, it was very
24 clear that when the 9019 motion was filed last year, it was
25 later narrowed down. It was narrowed. And so the public

1 policy questions that we want to address as to the environment
2 and the economic impact of the RSA, were no longer before the
3 Court.

4 So it was very reasonable, and I accepted that
5 decision at that time, because, yeah, well, you know, they
6 narrowed their RSA. So we didn't necessarily have to
7 intervene at that time, but certainly now these contracts are
8 the implementation of measures of the RSA or the
9 reorganization plan. And certainly it is appropriate at this
10 time for this Court to hear the citizens that are being
11 affected in their lives, you know, themselves, because of
12 these contracts.

13 I really don't have much else to say, because I'm
14 adopting basically the positions of UTIER and Windmar, but I
15 am concerned that because, you know, the Oversight Board has
16 very capable lawyers, and so does AAFAF, and you know, we have
17 very limited resources. And a decision by this Court allowing
18 the assumption of these contracts would, I believe -- even
19 though they are saying, oh, it would override a revocation of
20 the approval of the contracts by the agency, they're going to
21 use an assumption of the contract possibly as collateral
22 estoppel as to the sound business judgment or the benefit of
23 the debtor. So it would impact the motions that are pending
24 before the regulatory agency.

25 You know, we have a motion to intervene and a motion

1 for reconsideration that was presented in April, the end of
2 April, pending before the agency. And I fear that or I
3 suspect they are going to use an assumption of the contract in
4 some fashion to say, well, that was already adjudicated, and
5 then take it away from the agency to decide these issues about
6 whether pricing is good and what is the environmental impact
7 in these type of issues that this -- the agency has expertise
8 in.

9 And so, basically, that would be our oral argument
10 today, Your Honor. Thank you for your time.

11 THE COURT: Thank you very much, Mr. Santiago Sastre.

12 And now Mr. Possinger for five minutes of rebuttal.

13 MR. POSSINGER: Yes, Your Honor. Thank you.

14 And I'll start with the ripeness argument and I think
15 the related policy argument. I want to make clear what we are
16 seeking to do here is assume contracts pursuant to Section
17 365, period. We're not seeking to use this process to
18 override the authority of PREB or to preempt the process at
19 PREB, whatever, to the extent that that process is still
20 ongoing.

21 I understand that there are motions to reconsider. I
22 also understand that there really is no standing for parties
23 to intervene in a PREB proceeding. There may be appellate
24 rights. And I believe there is a tolling now because of the
25 COVID crisis, and the appellate rights may still exist. If

1 that process, you know, goes forward, the parties will have
2 whatever rights they have under Puerto Rico law to present
3 their policy positions.

4 And, you know, I'm certainly sympathetic to the
5 statement of the Environmental Group regarding contamination.
6 Nobody wants to hear about that or know that that's happening,
7 but that's a matter of energy policy in Puerto Rico. That's a
8 matter for PREB. PREB has spoken. PREB has entered an Order
9 approving these amendments. If there's an appeal, it can be
10 heard. If the appeal is successful, then, you know, I would
11 say PREPA is assuming these contracts as is, subject to Puerto
12 Rico law. And if PREB, the ultimate conclusion of the PREB
13 process is that the contracts are not approved by PREB, then
14 they're not approved.

15 However, under the contracts as we have there
16 written, assumption is a requirement for their effectiveness.
17 Approval by PREB and the Oversight Board, also requirements.
18 And again, there's no required order of events here. They can
19 occur independently, and, you know, the PREB approval has
20 already been obtained.

21 Regarding Your Honor's question as to, you know, what
22 is the harm to the opponents here if PREPA simply just has to
23 sign the new contracts and not get an assumption order, we've
24 heard that there's a concern that, well, then they'll be
25 administrative priority claims. And that begs the question:

1 What do they view as the alternative here.

2 For the next 12 years, these contracts provide that
3 PREPA will be able to access 40 percent of its power
4 generation stemming from the south coast of the island. If
5 the contracts are rejected, which seems to be the desire of
6 the opponents, what is the alternative, first of all? They
7 haven't identified any.

8 And second of all, they suggest that the alternative
9 will come free, and that -- or that the cost of providing
10 those alternatives will somehow be subject to discharge in
11 this Title III case. They wouldn't be. PREPA has to pay for
12 power and provide it to its customers. Under these contracts,
13 it has a source of doing that, a secure source of doing that
14 for the next 12 years.

15 With respect to the balance of the equities, Your
16 Honor, I would say again, that's -- the standard that they put
17 forward kicks in only when a debtor seeks to assume -- if
18 it -- I say it rejects a contract. If they want to argue that
19 assumption is the same, has the same standard, fine, but that
20 the standard would kick in only if either step is taken in
21 contravention of a federal policy. Here there's not even
22 contravention with a local policy.

23 But this isn't the forum to litigate policy. If they
24 say the PREB process is still open, that's where they should
25 take these arguments. Here the standard is business judgment,

1 and business judgment has been satisfied.

2 Finally, on the issue of novation, again, they put
3 forth their arguments on radical changes to these agreements.
4 These radical changes really boil down to amendments. That's
5 all they are. The fundamental nature of these contracts
6 remains intact. There's a supply of power. There's a supply
7 of liquid natural gas.

8 The statement in the contract that says it supercedes
9 all prior agreements is for clarity only. It is not a
10 substantive statement that renders these, you know, new
11 contracts, novated contracts pursuant to Puerto Rico law.
12 They are the original contracts as amended, substantively
13 amended, but amended nonetheless, and they're still subject to
14 assumption pursuant to 365.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Possinger.

17 I will take this matter under --

18 MR. MALONE: Your Honor.

19 THE COURT: Yes.

20 MR. MALONE: This is Michael Kelly Malone. May I
21 take a few minutes? I'm acting on behalf of PREPA. May I
22 take the remaining time, if possible?

23 THE COURT: Yes. I don't -- how much remaining time
24 was there, Ms. Selden?

25 MS. SELDEN: About a minute, Judge.

1 THE COURT: All right. So, briefly, Mr. Malone.

2 Yes.

3 MR. MALONE: Thank you, very much.

4 If I could just go quickly to the point of the reason
5 why the Assumption Order was part of the two contracts, and
6 that was a position required from the very beginning by the
7 two counterparties, Naturgy and EcoElectrica, because of the
8 very, very high value of payments that were going to happen
9 under both of those contracts over 12 years and the fact that
10 they were contracting with an insolvent party.

11 I'm -- a ruling that would find a novation and sort
12 of take this process outside of the Assumption Order would
13 deny the counterparties the administrative expense priority
14 and would likely have a big setback on these transactions.
15 And as Mr. Possinger already said, there are really no other
16 alternatives. It could be a significant setback to PREPA'S
17 program to roll out power, particularly in southern Puerto
18 Rico, as a result of that ruling.

19 I'll stop there, Your Honor.

20 THE COURT: Thank you, Mr. Malone.

21 And I thank all counsel for these arguments, which I
22 will continue to consider carefully. I will take the motion
23 under advisement, and I will issue a written opinion in due
24 course.

25 That concludes the set Agenda for today's

1 || proceedings. Are there any other matters that need to be
2 || addressed today?

3 || (No response.)

4 THE COURT: We will reconvene telephonically tomorrow
5 morning at 9:30 for the preliminary hearing on the Revenue
6 Bond Lift Stay Motions. Please note that due to an unforeseen
7 conflict in the Court's schedule, the timing for tomorrow's
8 hearing will be in the morning from 9:30 to 12:45, and if
9 necessary, resuming at 2:15 and continuing until five o'clock.
10 And I thank everyone in advance for the accommodation of the
11 Court's schedule.

12 Stay safe and keep well, everyone. I look forward to
13 reconvening tomorrow morning. We are adjourned.

14 (At 12:09 PM, proceedings concluded.)

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1 U.S. DISTRICT COURT)

2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 99 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 June 3, 2020.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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